Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ROBERT F. DVORAK,

Petitioner,

v.

UNITED STATES GOVERNMENT,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the imposition of an increased sentence for alleged perjury at trial violates Federal Rule of Criminal Procedure 32 and *Burns v. United States*, 501 U.S. 87 (1993) when the defendant receives no notice before the day of sentencing about which testimony constitutes the alleged perjury.

2. Whether a criminal defendant has been deprived of due process when the court imposes an increased sentence for his alleged perjury at trial when the defendant received no notice before the day of sentencing of the possible increase on that basis.

3. Whether the Fourth Circuit erroneously affirmed the district court's refusal to instruct the jury that a defendant's good faith belief in the propriety of his actions constitutes a complete defense to charges of wire fraud and false statements, when the proposed instruction was warranted by the evidence and the Fourth Circuit's ruling conflicts with the law in other circuits.

PARTIES TO THE PROCEEDING

The following individuals and entities are parties to the proceeding in the court below: Robert F. Dvorak, Defendant; and the United States of America, represented by Stephen P. Learned, Assistant United States Attorney for the Eastern District of Virginia, and Dabney Langhorne, Assistant United States Attorney for the Eastern District of Virginia.

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BRIEF FOR PETITIONER

Robert F. Dvorak, through undersigned counsel, respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit, which affirmed defendant's conviction by unpublished opinion dated October 17, 2000. Mr. Dvorak seeks review of two aspects of the judgment: the imposition of an enhanced sentence under the Federal Sentencing Guidelines for his supposed perjury at trial, and the trial court's erroneous refusal to instruct the jury that good faith was a complete defense to the charges of false statements and wire fraud.

First, Mr. Dvorak seeks review of the district court's imposition of a two-level sentencing enhancement for alleged obstruction of justice on the grounds of alleged perjury because (1) Mr. Dvorak did not receive notice before sentencing of what portion of his testimony was perjurious, in violation of Fed. R. Crim. P. 32 and *Burns v. United States*, 501 U.S. 129 (1991); and (2) Mr. Dvorak was deprived of his right to due process because he did not receive notice about which testimony constituted the alleged perjury. The Fourth Circuit decided an important federal question concerning the Federal Sentencing Guidelines that conflicts with relevant decisions of this Court and those of other circuit courts and deprived Mr. Dvorak of his right to due process under the Fifth Amendment to the United States Constitution.

Mr. Dvorak also seeks review of the district court's refusal to instruct the jury that Mr. Dvorak's good faith belief in the propriety of his actions constituted a complete defense to the charges of violating the wire fraud (18 U.S.C. § 1343) and false statements (18 U.S.C. § 1001) statutes. The instruction would have provided crucial guidance to the jury on the central proposition of the defense, namely that Mr. Dvorak honestly, even if mistakenly, believed that he was engaged in legitimate business transactions with a representative of the Drug Enforcement Administration

("DEA"). Mr. Dvorak requested an appropriate instruction before trial; the evidence supported the instruction; and the government did not object to the giving or the wording of the instruction. This issue warrants review by the Supreme Court because the Fourth Circuit's decision conflicts with established precedent requiring an instruction to the jury on the defendant's defense and conflicts with the law in other circuits requiring the giving of a good faith instruction under the circumstances of this case. This Court should grant Mr. Dvorak's Petition for a Writ of Certiorari.

OPINIONS BELOW

None of the opinions and orders at issue is published. The Final Judgment in a Criminal Case, dated April 28, 2000, as amended on May 4, 2000, is contained in the Supreme Court Appendix ("A.") at 4a-21a.[1] The Findings and Reasons of the Court Regarding Presentence Report dated April 28, 2000 may be found in the Appendix 23a-25a. The Fourth Circuit's order affirming the conviction dated October 17, 2000 is an unpublished disposition which may be found at 2000 WL 1532904 and is also found at A. 1a-3a.

JURISDICTION

The Judgment of the Fourth Circuit Court of Appeals was issued on October 17, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (l).

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[1] "A." refers to Volume I of the Appendix filed in this Court. "F.C.A." refers to the Fourth Circuit Appendix that contains the record filed with Fourth Circuit below, and refers to citations not included in the Supreme Court Appendix. "Sealed A." refers to the Volume II of the Appendix filed in this Court, which contains confidential materials related to sentencing filed in the Fourth Circuit that were sealed by the Fourth Circuit.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional and statutory provisions at issue are reproduced in the Appendix at Volume I, pages 66a-86a. These provisions include the relevant Federal Sentencing Guidelines.

STATEMENT OF THE CASE

This case arises out of a judgment of conviction of defendant Robert F. Dvorak in the United States District Court for the Eastern District of Virginia, and a subsequent appeal. The United States Court of Appeals for the Fourth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

The indictment alleged that Mr. Dvorak conspired with Robert Burchell ("Burchell"), then an employee of the DEA, to defraud the United States by enabling Mr. Burchell to embezzle equipment that the DEA purchased from Ritz Audio Visual Associates ("Ritz"), a company of which Mr. Dvorak owned 40%. Ritz is a small business that sells audio-visual equipment and services to a variety of commercial and governmental customers. (F.C.A. 495-498; Sealed A. 17a-18a).

The indictment also charged Mr. Dvorak with fourteen counts of false statements under 18 U.S.C. § 1001 for submitting false invoices to the DEA, 4 counts under 18 U.S.C. § 1343 for similar conduct, and one count under 18 U.S.C. § 371 for conspiracy. The indictment alleged that the false invoices concealed the embezzlement scheme from the DEA. Following guilty verdicts on all counts, the court sentenced Mr. Dvorak to thirty-seven months as to each count to be served concurrently. (A. 6a). The Court of Appeals of the Fourth Circuit affirmed Mr. Dvorak's conviction by unpublished per curiam opinion on October 17, 2000. (A. 1a-3a).

FACTS RELEVANT TO THIS PETITION

The critical disputed issue at trial was whether Mr. Dvorak knew that Burchell or others were stealing from the DEA and whether he joined in that effort. There was no dispute at trial that Ritz had sold the items to the DEA and no dispute that Burchell or his accomplices had stolen some of them. The government's evidence consisted exclusively of circumstantial evidence drawn from the documents and the transactions and the testimony of discredited conspiratorial mastermind, Robert Burchell.

A. The Government's Evidence

1. Robert Burchell's Scheme at the Drug Enforcement Administration

The government's case rested almost solely on the testimony of Burchell, who, despite his position of responsibility at the DEA, led a nine-year scheme to embezzle more than $2.6 million worth of goods from the DEA. (F.C.A. 153, 276). He ordered goods from outside vendors using standard DEA purchase orders, received the goods himself, certified that the DEA had received them, and arranged for the DEA to pay for the goods. Burchell either kept the goods or sold them. Eventually apprehended, he pled guilty in July 1998 and now is serving a 40-month prison sentence. (F.C.A. 151, 273-275).

Burchell took elaborate steps to conceal his embezzlement scheme, including the preparation of false internal paperwork at the DEA and the creation of vague purchase orders to send to outside vendors. Burchell or other DEA employees would certify falsely that the DEA, rather than Burchell, had received the items. (F.C.A. 279). Burchell himself approved invoices submitted for payment to the DEA. (F.C.A. 161, 228). Burchell's scheme exploited the government's strict requirement that vendor invoices match government purchase orders. Burchell issued purchase orders that contained vague descriptions. The vendor's invoice thus

had to contain a matching, albeit vague, description of the items provided to the government. The DEA would not pay invoices that did not match the purchase order. Every government agency insists on this kind of matching. (F.C.A. 398-399, 402).

2. Burchell's Dealings With Mr. Dvorak's Company, Ritz Audio Visual

In 1993, Burchell began to purchase items from Ritz, which Burchell picked out of the Yellow Pages. Although Burchell dealt originally with Mr. Dvorak's partner, Gary Lunsford, he soon began to transact business almost exclusively with Mr. Dvorak. Unbeknownst to Lunsford or Dvorak, Burchell was embezzling these items. Consistent with government purchasing policy, Burchell insisted that the invoice sent to the DEA had to match the purchase order provided to Ritz. (F.C.A. 39). Lunsford and Dvorak complied with Burchell's instructions and wrote the Ritz invoice to match the DEA purchase order.

Ritz, which did business with over 50 government agencies, had received similar instructions from other agencies, which "quite often" insisted that the invoice had to match the purchase order or insisted that an invoice be written in a particular way. (F.C.A. 398-399, 402). Ritz's credit manager testified that the government often would refuse to pay the bill if the invoice did not match the purchase order. (F.C.A. 465-468, 873-886). Burchell and a government auditor testified to the same practice. (F.C.A. 294, 432).

Burchell began to transact business with Ritz exclusively through Mr. Dvorak. Burchell would order merchandise by telephone and then would issue purchase orders, signed by other persons, that contained vague or incomplete descriptions (F.C.A. 514-515). Following Burchell's instructions, Mr. Dvorak issued matching invoices. When Mr. Dvorak submitted invoices that included more detail than the purchase order, Burchell rejected them and told Mr. Dvorak that the invoices had to match. (F.C.A. 517-521,

526-528, 532, 1246, 1285). Burchell insisted on vague purchases even for wholly legitimate purchases, such as the installation of antennas at the DEA headquarters. (F.C.A. 527-533, 1246, 1285).

Burchell ordered a variety of items from Ritz between March 1993 and September 1997, including video projectors, audio equipment, cameras, camcorders, and computer monitors. He also purchased items such as a lawn tractor, a jet ski, a whirlpool, and thousands of dollars worth of music CD-ROMs and movie laser discs. Burchell purchased virtually all of them by causing DEA purchase orders to be issued for the purchases, certifying DEA's receipt of the goods, and approving the issuance of a government check for the items. (F.C.A. 173, 295-296, 514-515).

Burchell provided no direct evidence that Mr. Dvorak knew that Burchell was stealing any of the items. Burchell did not tell Mr. Dvorak that he was stealing any of the items. He did not pay kickbacks to Mr. Dvorak nor arrange for him to share in any of the profits from Burchell's sale of the stolen items. (F.C.A. 316, 569).

Burchell was substantially impeached with his plea agreement and the prospect of further reductions in his sentence as a reward for his testimony. He acknowledged he had been stealing from the DEA since 1988, long before he ever met Mr. Dvorak. (F.C.A. 275-277). He admitted that he falsified internal and external documents and lied repeatedly to other DEA employees. Burchell admitted that he had not been truthful in his debriefing sessions with the prosecutor and the FBI agents. (F.C.A. 285-290). The trial judge noted that Burchell admitted "stealing, lying and being a crook." (F.C.A. 285).

B. The Defendant's Evidence

Mr. Dvorak unequivocally testified that he did not join the conspiracy, and that he did not think that he was cheating the DEA, or that Burchell was stealing from the DEA. (F.C.A. 569-570). Mr. Dvorak testified that Burchell specifically told

him that the DEA needed Ritz's help and Mr. Dvorak thought he was helping the DEA. (F.C.A. 510, 536-537, 538-540, 547, 558). Mr. Dvorak thought that Burchell was involved in supplying DEA undercover operations or ordering DEA supplies. Burchell admitted that he made purchases for DEA undercover operations, and that the DEA created "front" companies, such as stockbrokers, and check cashing companies as undercover operations. (F.C.A. 306-308). Mr. Dvorak learned that Burchell had shown a Ritz employee a DEA workshop where surveillance equipment was being installed into pinball machines and arcade machines. Furthermore, Mr. Dvorak's brother, Charles, a former CIA employee told him that items such as those being ordered by the DEA were used for people on hardship posts and for bribes and that it was not unusual for the DEA to be purchasing them. (F.C.A. 488-491). Charles told Robert that as long as the agency issued a purchase order for the goods, the purchases were unremarkable. (F.C.A. 490).

C. Request for Instruction That Good Faith Belief Is a Complete Defense

Mr. Dvorak requested an instruction that good faith was a complete defense to the false statements and wire fraud charges. (A. 89a). The government did not object. Nevertheless, the court simply declined to give this instruction, stating only that "it seems to me that an appropriate instruction on willfulness and the requirement of willfulness and knowingly is adequate." (A. 89a).

Proof of each of the three crimes with which Mr. Dvorak was charged required the government to prove that he had acted willfully. The court defined "willfulness" and knowingly" in the following instruction:

> The term willfully is used. To act willfully is to act voluntarily and intentionally and with a specific intent to do something the law forbids; that is, with a bad purpose, to either disobey or disregard the law. To act knowingly is to act voluntarily and

> intentionally and not because of a mistake or accident or other innocent reason.

(A. 91a)

D. Mr. Dvorak's Sentencing

Prior to sentencing, the United States Probation office issued a Presentence Report, which proposed an enhancement for obstruction of justice because:

> The defendant obstructed justice in this case and has been given a two level enhancement accordingly. He denied his guilt under oath, contradicted testimony by Burchell found by the jury to be truthful, and he failed to fully disclose documents to the grand jury when directed to do so. Regarding the latter element of the obstructive behavior, the defendant produced requested Ritz documents to the grand jury in 1998 but did not include the invoice and purchase order for transaction 18 which was the first clear fraudulent purchase (laser disks). The defendant has maintained that he never saw these documents and never had them in his possession. He could provide no explanation for the later emergence of these documents, and could not explain the internal Ritz order form for that same transaction that noted in his handwriting, "copy of purchase order never received."

(Sealed A. 14a).

The Probation Officer identified no specific element of testimony that Mr. Dvorak lied under oath.

Mr. Dvorak, through counsel, timely objected to the obstruction of justice enhancement on the grounds that Mr. Dvorak's mere denial of guilt in his testimony could not support such an enhancement; that the jury could have found that Mr. Dvorak did not lie, but nevertheless concluded that he knew enough about Burchell's actions that he acted with the requisite criminal knowledge, or displayed willful

blindness; and that the government was speculating that Mr. Dvorak destroyed the referenced document, offered no proof that the destruction, in fact, had happened, and that it was more likely that Burchell himself, an admitted forger, fabricated the DEA document in the DEA files. (Sealed A. 47a-48a). Mr. Dvorak pointed out that "the PSR identifies no specific testimony that was supposedly false." (Sealed A. 48a). The government did not respond to these objections. (Sealed A. 76a-82a).

The Probation Officer issued an Addendum to the Presentence Report, focusing on alleged document destruction:

> there is enough evidence available to conclude that the defendant provided untruthful testimony regarding Government Ex. 18.1. Discrepancies surrounding this document were clear during trial testimony and the jury ultimately found the defendant guilty. The enhancement was not given based simply on the defendant's denial of guilt, but his elaboration, determined to be untrue, about questionable documents and procedures during sales between Ritz and the DEA. Further, the defendant failed to turn over the document referred to in Exhibit 18, as ordered by the FBI. While he has maintained that the document did not exist, it was ultimately provided to the government by the DEA.

(Sealed A. 80a).

The Addendum did not discuss perjury, focusing instead on alleged discrepancies concerning Government's Exhibit 18.1, and conclusory statements about Mr. Dvorak's "elaboration, determined to be untrue, about questionable documents and procedures during sales between Ritz and the DEA." (Sealed A. 80a).

The government's sentencing memorandum focused only on the "evidence" of the alleged removal of a document

from the Ritz files and identified no evidentiary basis for any enhancement based on supposed perjured testimony. (A. 148a-186a). The government's supplemental memorandum, filed in response to Mr. Dvorak's memorandum objecting to any enhancement based on document destruction, identified no specific instances of allegedly false testimony. (A. 187a-219a, 220a-224a). In his memorandum, Mr. Dvorak specifically asked that the "Court require the government to produce evidence at the sentencing hearing regarding the recommended enhancement." (A. 195a)

At the sentencing hearing, the court rejected the argument that an obstruction of justice enhancement could rest on "the failure to, on the document that allegedly was not produced in response to the subpoena." (A. 37a). The court added, however,

> But I do think there is a legitimate issue whether he took the stand and lied, and that would be, if I find an obstruction of justice enhancement appropriate, it would be on that prong that is mentioned in the Presentence report.

(A. 37a) (emphasis added).

Counsel for the defendant objected at the sentencing hearing to the lack of notice about the potential enhancement based on perjury. (A. 37a). Once the district court stated it would not rely on document destruction, defense counsel pointed out that the government had not argued the perjury point. There remained a "question of notice to Mr. Dvorak about precisely what was the false testimony that he was supposed to have given." (A. 37a). Counsel argued further that there was no necessary contradiction between the testimony of Burchell and Dvorak, but that the jury found Mr. Dvorak had been willfully blind and thus had the requisite knowledge. (A. 38a-39a, 53a).

The prosecutor argued that a perjury enhancement was justified because Mr. Dvorak contradicted Burchell's testimony concerning one alleged conversation between them.

(A. 52a). This particular instance of alleged perjury was not mentioned in the Presentence Report, or anywhere in the government's sentencing memorandum. Apparently taken by surprise by the court's focus on perjury, the government presented no other specifics, adding only that "there are numerous instances, Your Honor, that was just direct testimony, you know, in direct contradiction to what Burchell said. So we think that obstruction, this is a clear case of it." (A. 52a).

In ruling, the court did not rely on the prosecutor's example. Instead, the court stated:

> The obstruction of justice enhancement is in my opinion warranted, because I find that the defendant's statement that he was not only unaware of the deviousness and culpability of Burchell, but indeed he thought, to the contrary, that these were perfectly legitimate purchases for the DEA to be both false and material.
>
> This is not just the defendant against the word of Burchell. This was false testimony, and it was the testimony that centered on the real issue in the case. There wasn't any question there had been embezzlement. The only real question as far as this defendant was concerned is whether he knew of it and participated in it, and in my opinion his statement that he did not know it was false and was material in that it was the basis upon which the jury, or could have been the basis on which the jury acquitted him. So that enhancement is justified.

(A. 56a-57a). The court's stated basis for the obstruction of justice enhancement appeared nowhere in any of the pre-sentence submissions or filings, and the court otherwise gave no notice to the defendant that it intended to enhance Mr. Dvorak's sentence on these grounds. The court's post-sentencing ruling stated "The court finds an obstruction of

justice enhancement appropriate for giving false material testimony at trial." (A. 23a).

ARGUMENT

A. Fed. R. Crim. P. 32 Requires Notice of the Factual Basis for an Adjustment Based on Perjury

The Sentencing Reform Act of 1984, which "revolutionized" sentencing in the federal courts, *Burns v. United States*, 501 U.S. 129, 131 (1991), requires the imposition of sentences in accordance with the Federal Sentencing Guidelines (the "Guidelines"). The Guidelines provide certain presumptive sentences within statutory limits. "A district court must impose a sentence within the applicable Guideline range, if it finds the case to be a typical one." *Koon v. United States*, 518 U.S. 81, 85 (1996). The district court first determines the applicable guideline section and a "base offense level" under Chapter Two of the Guidelines. USSG § 1B1.1 (a),(b). Having made this initial determination, the district court then must "apply the adjustments as appropriate related to victim, role, and obstruction of justice" from Chapter Three.[2] § 1B1.2(c). The guidelines permit an upward adjustment for obstruction of justice where the district court finds that a defendant has perjured himself during trial. USSG § 3C1.1; *United States v. Dunnigan*, 507 U.S. 87, 88-89 (1993). Once the court arrives at a presumptive sentence, the district court may "depart" either upward or downward if the case is outside the "heartland" of cases to which that guideline applies. USSG § 1A4(b), p.s.; *Koon*, 518 U.S. at 94-95, 98-99.

This Court held in *Burns* that Fed. R. Crim. P. 32 requires notice to a defendant of a possible upward departure under the Sentencing Guidelines. *Burns*, 501 U.S. at 138

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[2] There are other adjustments within Chapter Three for grouping of multiple counts and acceptance of responsibility that are not relevant to this case. USSG § 1B1.1(d)(e).

("before a district court can depart upward on a ground not identified as a ground for upward departure either in the presentence report or in a prehearing submission by the government, Rule 32 requires that the district court give the parties reasonable notice that it is contemplating such a ruling.") Moreover, the "notice must specifically identify the ground on which the district court is contemplating an upward departure." *Id.*[3]

While the circuits agree that *Burns* applies to departures, the circuits are split as to whether the *Burns* notice extends to adjustments or enhancements. The Second, Seventh and Ninth Circuits have interpreted *Burns* to require notice for proposed adjustments or enhancements under the Guidelines.[4]

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[3] The circuits that have addressed this issue have adopted *Burns* as requiring notice for both upward and downward departures. *See, e.g., United States v. Mangone*, 105 F.3d 29 (1st Cir. 1997); *United States v. Medford*, 194 F.3d 641 (3rd Cir. 1999)(upward departure); *United States v. Barr*, 963 F.2d 641 (3d Cir. 1992)(same); *United States v. Maddox*, 48 F.3d 791 (4th Cir. 1995) (upward and downward departures); *United States v. Maxton*, 940 F.2d 103 (4th Cir. 1991) (upward departure); *U.S. v. Otis*, 107 F.3d 487 (7th Cir. 1997); *United States v. Valentine*, 21 F.3d 395 (11th Cir. 1994) (upward departure); *United States v. Alba*, 933 F.2d 1117 (2nd Cir. 1991)(downward departure); *United States v. Pankhurst*, 118 F.3d 345 (5th Cir. 1997); *United States v. Andruska*, 964 F.2d 640 (7th Cir. 1992)(downward departure); and *United States v. Green*, 105 F.3d 1321 (9th Cir. 1997).

[4] *See, e.g., United States v. Zapatka*, 44 F.3d 112, 115-16 (2d Cir. 1994)(extending notice requirement to adjustments where it was not recommended by PSR, a factual dispute existed as to defendant's conduct, and it was unclear which guideline warranted the adjustment); *United States v. Jackson*, 32 F.3d 1101, 1105-06 (7th Cir. 1994) (requiring reasonable notice that court intends to enhance sentence); and *United States v. Brady*, 928 F.2d 844, 847 n. 3 (9th Cir. 1991), abrogated on other grounds, *Nichols v. United States*, 511 U.S. 738, (1994)(adequate notice required not only for departures but for an adjustment to the base offense level). *See also United States v. Thomas*, 969 F.2d 352, 356 n. 2 (7th Cir. 1992)(while *Burns* does not require notice of enhancements, Fed. R. Crim. P. 32 requires that a defendant receive some notice of enhancements). The Third Circuit has also stated that a "District Court ... [cannot] ... impose [an] adjustment unless the parties [are] notified and been given an

The First, Fifth, Sixth, and Eighth Circuits have held, however, that no notice of the grounds for an adjustment or enhancement is required.[5]

The Fourth Circuit apparently has joined the First, Fifth and Eighth Circuits in rejecting any requirement of notice about adjustments. Although there are no published decisions on this point, the Fourth Circuit has stated in an unpublished disposition that "Rule 32 and *Burns* do not require advance notice of sua sponte adjustments to the guideline calculation, at least where the facts relevant to the adjustment are known to the defendant, because the bases for adjustments are limited and are set out in the guidelines." *United States v. Rucker*, 122 F.3d 1064, 1997 WL 564144 (4th Cir.)(Table Decision),

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opportunity to brief the issue prior to sentencing." *United States v. Mackins*, 218 F.3d 263, 269 (3rd Cir. 2000).

[5] *United States v. Canada*, 960 F.2d 263, 266-267 (1st Cir. 1992) (reading *Burns* to require special notice only for departures from the Guidelines' sentencing range rather than for all Guidelines adjustments); *United States v. Knight*, 76 F.3d 86, 88 (5th Cir. 1996); *United States v. Guthrie*, 144 F.3d 1006 (6th Cir. 1998) (declining to extend Burns to enhancements); and *United States v. Willis*, 997 F.2d 407 (8th Cir. 1993) (no prior notice required before imposing enhancement for obstruction of justice). *See also United States v. Adipietro*, 983 F.2d 1468 (8th Cir. 1993)(*Burns* does not mandate that adequate notice must be given before a district court addresses an adjustment or enhancement). These courts reason that the delineation of adjustments in Sentencing Guidelines themselves provides notice to defendants of possible grounds for adjustment, at least where the facts relevant to the adjustment are known to the defendant. *See e.g., Canada*, 960 F.2d at 266 (guidelines themselves give defendant all the notice required regarding any adjustment a district court contemplates imposing); *Knight*, 76 F.3d at 88 ("at least if the defendant has actual notice of the fact on which the district court bases an enhancement or a denial of a reduction, the Sentencing Guidelines themselves provide notice of grounds relevant to the proceeding sufficient to satisfy the requirements of Rule 32 and USSG § 6A1.3); *Hayes*, 171 F.3d at 392 ("a defendant, of course, is on notice of the contents of the Guidelines"); and *Willis*, 997 F.2d at 415 (Guidelines provided defendant of notice of the potential bases for enhancement).

citing *Knight*, 76 F.3d at 88; *Willis*, 997 F.2d at 416-417; and *Canada*, 960 F.2d at 265-68.

Burns explains that notice of an upward departure is important to permit "full adversary testing of the issues relevant to a Guidelines sentence" so that the parties have "'an opportunity to comment upon the probation officer's determination and on other matters relating to the appropriate sentence.'" *Burns*, 501 U.S. at 136 (quoting Fed. R. Crim. P. 32(a)(1)). The court emphasized that the purpose of Rule 32 was "focused, adversarial resolution of the legal and factual issues relevant to fixing Guidelines sentences." *Burns*, 501 U.S. at 136. "The right to be heard has little reality or worth unless one is informed that a decision is contemplated." *Id.* at 136 (internal quotation omitted).

This reasoning applies with equal force to adjustments in a guidelines sentence. An adjustment often has the effect of increasing the actual sentence that a defendant receives. As "sentencing is arguably the most critical stage of the criminal proceeding,..., and because an adjustment ... is a 'factor important to the sentencing determination,' i.e., it may very likely result in an increase in the defendant's sentence, the defendant is entitled to notice." *United States v. Jackson*, 32 F.3d 1101, 1106 (7th Cir. 1994) (citing USSG § 6A1.3(a), which refers to an enhancement for abuse of trust). Thus, "when a trial judge relies on a Guideline factor not mentioned in the PSR nor in the prosecutor's recommendation, contemporaneous notice at the sentencing hearing ... fails to satisfy the dictates of Rule 32." *Jackson*, 32 F.3d at 1106. Moreover, "a defendant and his counsel are entitled to know in advance of the sentencing hearing of the factual grounds and the basis in the Sentencing Guidelines for a proposed enhancement." *Jackson*, 32 F.3d at 1107 n. 4. "Only when equipped with knowledge of both the facts and the Guideline section at issue will defense counsel be prepared to defend his client." *Jackson*, 32 F.3d at 1107 n. 4.

Notice of the factual basis for an adjustment based on obstruction of justice resting on alleged perjury aids in

implementing the Policy Statements of the Guidelines regarding disputed issues at sentencing. The Guidelines recommend "the narrowing and resolution...of issues in dispute in advance of the sentencing hearing." USSG § 6A1.2, p.s. The Guidelines also provide that "[w]hen any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor." USSG § 6A1.3(a), p.s. The provisions of Rule 32 allow this adversarial presentation and narrowing of issues by requiring disclosure of the Presentence Report 35 days in advance of sentencing (Fed. R. Crim. P. 32 (b)(6)(A)), requiring the parties to submit objections and responses to the Report within 14 days after receiving it (Fed. R. Crim. P. 32 (b)(6)(B)) and requiring a further effort to resolve the factual differences by the presentence report writer at least 7 days before the hearing (Fed. R. Crim. P. 32 (b)(6)(C)). This procedure, which is substantially more formal than pre-guidelines practice, allows the narrowing of issues by giving the parties' notice of the factors that may be "important to the sentencing determination."

The need for adequate notice of the factual predicate for an enhancement is demonstrated by this case. The presentence report recommended a two-level increase for obstruction of justice based on perjury at trial because Mr. Dvorak "denied his guilt under oath [and] contradicted testimony by Burchell found by the jury to be truthful." (Sealed A. 14a). The Report identified no specific false testimony. The defense objected to the Report because it "identifies no specific testimony that was supposedly false." (Sealed A. 47a). Rather than meet these objections, the presentence report writer merely emphasized the evidence that supported an enhancement based on document destruction. (Sealed A. 80a).

Similarly, neither the government's original sentencing memorandum, nor its supplemental sentencing memorandum filed in response to Mr. Dvorak's sentencing memorandum, identified any specific instances of the allegedly false

testimony. (A. 148a-186a, 220a-224a). The government essentially abandoned its claim that Mr. Dvorak had perjured himself. The government argued instead that an enhancement was warranted because of document destruction, but not for false testimony.

When defendant arrived at the sentencing hearing, the obstruction of justice issues had been focused solely on alleged document destruction. When the district court announced that it would not find an obstruction based on the document destruction, but wanted to hear argument on the perjury point, the court posed a question that had caught both sides by surprise. The court did nothing to alleviate the surprise as it did not focus the parties on any particular allegedly perjurious statements. In response, the government could offer little more than vague generalities about supposed perjury. The prosecutor's sole arguments were that "there [were] numerous instances . . . just direct testimony . . . in direct contradiction to what Mr. Burchell said. So we think that obstruction, this is a clear case of it." (A. 52a).

Counsel for the defendant objected during the sentencing hearing to the lack of notice of "what precisely was the false testimony he was supposed to have given." (A. 37a). As no one had identified any particular portion of testimony, counsel could not respond to the suggestion of perjury except by arguing that the jury could have believed Mr. Dvorak's testimony about his thoughts but still found him guilty on a "willful blindness" theory. (A. 38a-39a).

When pressed for a specific example, the prosecutor could refer only to a single conversation between Burchell and Mr. Dvorak, which Mr. Dvorak denied, and which the district court did not use as a basis for the perjury enhancement.

The jury could just as easily have credited Burchell's testimony where it was consistent with Mr. Dvorak's, and rejected the rest, particularly given the evidence concerning Burchell's badly damaged credibility. An admitted forger and

thief, Burchell admitted that he lied thousands of times concerning his scheme at the DEA. (F.C.A. 277-278). Indeed, the supposed conversation about a camper, which Burchell stated involved a conversation about his retirement to Bracey, Virginia, was one that Burchell had not mentioned to the prosecutor or the FBI agents despite his being debriefed more than ten times before trial. Burchell admitted that he made up this testimony for the trial itself. (F.C.A. 308-311).

The sentencing judge, however, was obviously thinking of specific examples, which he did not identify for the parties until his ruling. Declining to rely on the prosecutor's example, the court ruled that the obstruction of justice enhancement was warranted, based on "the defendant's statement that he was not only unaware of the deviousness and culpability of Burchell, but indeed he thought, to the contrary, that these were perfectly legitimate purchases from the DEA." (A. 56a-57a). This alleged factual predicate appeared nowhere in the Presentence Report, the government's submissions, the prosecutor's argument at sentencing, or the judge's opening remarks at sentencing.

Mr. Dvorak sought to overturn his sentencing enhancement in the Fourth Circuit precisely on the grounds that the district court had failed to give him notice of what specific testimony would underlie any potential enhancement for obstruction of justice. *See* Fourth Circuit Brief for Appellant at 49, 52-54; Fourth Circuit Reply Brief of the Appellant at 20-26. The Fourth Circuit merely affirmed without addressing the argument. (A. 1a-3a).

The Fourth Circuit erred by upholding a sentencing enhancement where Mr. Dvorak received no notice of the specific testimony that the district court found to be perjurious. The Fourth's Circuit's ruling was error because it upheld a sentencing where Mr. Dvorak lacked any chance to prepare for the allegation and meet it with evidence from the trial. An accusation of perjury must refer to some specific instances of false testimony. Without knowing what item of testimony that the district court might find false and

perjurious, the defendant cannot marshal contrary evidence and seek to dissuade the court of its conclusion. The trial court's failure to give notice to Mr. Dvorak left him defenseless against the imposition of additional punishment without any realistic chance to meet or refute it. Mr. Dvorak was deprived of his right to "full adversarial testing of the issues and an opportunity to comment," *see Burns*, 501 U.S. at 136, as he had no notice of this basis for enhancement.[6] *Compare United States v. Hatney*, 80 F.3d 458, 461 (11th Cir. 1996) (notice to defendant of obstruction of justice enhancement based on perjured trial testimony was sufficient because the Presentence Report included the specific statements alleged to have been perjurious, along with the specific testimony of other witnesses which contradicted defendant's testimony).

This issue is of great practical importance in the administration of justice by the courts. In the fiscal year 1999, the most recent year for which data is available, approximately 57,000 adjustments were made to individual defendants' sentences. Approximately three quarters of these adjustments were given for acceptance of responsibility. Thus, one quarter of the total adjustments given encompassed all other types of adjustments. Not insignificantly, approximately 1,666 of these remaining adjustments were given for obstruction of justice. United States Sentencing

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[6] In contrast, the resolution of the document destruction issue demonstrates the importance of notice of the factual predicate supporting an enhancement. The presentence report and addendum identified a specific document that Mr. Dvorak allegedly destroyed. In response to Mr. Dvorak's objection that there was no evidence to support the alleged document destruction, the probation officer provided additional factual support for the alleged document destruction. (Sealed A. 80a). The government's sentencing memorandum also focused on the alleged document destruction. (A. 148a-186a). The presentence submissions were detailed enough that the court did not need to address these grounds for the enhancement before rejecting it out-of-hand at sentencing. (A. 37a).

Commission, 1999 Sourcebook of Federal Sentencing Statistics (1999), Table 18 ("Offenders Receiving Each Chapter Three Guideline Adjustment, Fiscal Year 1999").

B. Lack of Notice about the Factual Basis for An Enhancement Based on Perjury Violates the Due Process Clause

The Fifth Amendment Due Process clause unmistakably applies to sentencing proceedings. *Jones v. United States*, 526 U.S. 227, 242 n. 6 (1999); *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (plurality opinion).; *United States v. Rone*, 743 F.2d 1169, 1171 (7th Cir. 1984) ("convicted defendants . . . have a due process right to a fair sentencing proceeding"). "The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process." *Gardner*, 430 U.S. at 358; *Tucker v United States*, 404 U.S. 443, 447-49 (1972)(The Constitution forbids a sentence that rests on "misinformation of constitutional magnitude"). *See also Apprendi v. New Jersey*, 530 U.S. 466 (2000) (applying the due process clause to sentencing procedures, stating that "under the due process clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.").

A fundamental component of Due Process is notice of the factual basis for the imposition of sentence. *Burns* recognized the significance of the notice issue in construing Rule 32. As the court noted, "[w]ere we to read Rule 32 to dispense with notice, we would then have to confront the serious question whether notice in this setting is mandated by the Due Process Clause." *Burns*, 501 U.S. at 138. "A fundamental requirement of due process of law in any proceeding which is to be accorded finality is notice reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and afford

them an opportunity to be heard." *Mullane v. Hanover*, 339 U.S. 306, 314 (1950) (citations omitted). "The essence of due process is the requirement that 'a person in jeopardy of serious loss (be given) notice of the case against him and the opportunity to meet it'." *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976). "The notice must be of such a nature as reasonably calculated to convey the required information." *Mullane*, 339 U.S. at 314 (citations omitted) (emphasis added). "Mere gestures" are not due process. *Mullane*, 339 U.S. at 314.

The constitutionally deficient notice in this case arose because no one - not the presentence report writer, the prosecutor or the court - specified in advance the portion of Mr. Dvorak's testimony that was supposed to be perjurious. We do not claim to have lacked notice that perjury at trial in general may result in an adjustment to a sentence for obstruction of justice, as the Guidelines specify that "committing, suborning, or attempting to suborn perjury" may constitute an obstruction of justice. USSG § 3C1.1, comment. (n. 4(b)). Nor do we claim that we lacked notice about some evidence on which the sentencing court relied, such as an undisclosed transcript from another trial, *compare United States v. Berzon*, 941 F. 2d 8, 19 (1st Cir. 1991) or secret letters to the court that were not disclosed to the defendant. *compare United States v. Hayes*, 171 F. 3rd 389, 392 (6th Cir. 1999). Here, Mr. Dvorak lacked notice about which testimony was alleged to be perjurious.

While the Guidelines permit a sentencing enhancement for perjury during the trial, "not every accused who testifies at trial and is convicted will incur an enhanced sentence under 3C1.1 for committing perjury." *See Dunnigan*, 507 U.S. at 95. As this Court held in *Dunnigan*,

> an accused may give inaccurate testimony due to confusion, mistake, or faulty memory. In other instances, an accused may testify to matters such as lack of capacity, insanity, duress, or self-defense. Her testimony may be truthful, but the jury may

> nonetheless find the testimony insufficient to excuse criminal liability or prove lack of intent.

Id. at 98.[7] *See also* USSG § 3C1.1, comment. (n. 3) ("inaccurate testimony . . . sometimes may result from confusion, mistake, or faulty memory and thus, not all inaccurate testimony . . . necessarily reflects a willful attempt to obstruct justice"). *United States v. Moore*, 484 F.2d 1284, 1287-1288 (4th Cir. 1973) ("a verdict of guilty means only that guilt has been proved beyond a reasonable doubt, not that the defendant has lied in maintaining his innocence").

Nor did Mr. Dvorak have notice from the verdict alone that the jury must have found his testimony perjurious. In this case, the government relied heavily on a theory that Mr. Dvorak was "willfully blind" to Burchell's criminal conduct. The government argued that, despite Mr. Dvorak's denial that he knew of Burchell's criminal purpose, Mr. Dvorak was guilty because he had turned a blind eye to Burchell's conduct. Under that theory of the case, the jury may have found that Mr. Dvorak's testimony was entirely truthful, but nonetheless, "insufficient to excuse criminal liability or prove lack of intent." *Dunnigan*, 507 U.S. at 98.

Even if the jury did not find Mr. Dvorak's testimony to be accurate, it hardly follows that his testimony was perjurious. Under the Guidelines, the mere fact that Mr. Dvorak "denied his guilt under oath" does not support a two-level enhancement. *See* USSG § 3C1.1, comment. (n. 2) ("a defendant's denial of guilt [other than a denial of guilt under oath that constitutes perjury] . . . is not a basis for application of this provision"). While Mr. Dvorak's right to testify does not create a right to commit perjury, the enhancement may not

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[7] This Court defined perjury under the federal perjury statute, 18 U.S.C. § 1621, as "[a] witness testifying under oath or affirmation violates this statute if she gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory." *Dunnigan*, 507 U.S. at 94.

be given simply because a defendant testifies on his own behalf and the jury disbelieves him. *United States v. Holt*, 969 F.2d 685, 688 (8th Cir. 1992) (citations omitted). A perjury enhancement under the Guidelines should rest on something more than simple contradiction between the testimony of witnesses. The simple disagreement between the testimonies of two witnesses would not support a conviction for perjury for either of them. *Hammer v. United States*, 271 U.S. 620, 626 (1926) ("the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the accused"); *Weiler v. United States*, 323 U.S. 606, 607 (1945) (refusal to instruct on the "two witness rule" was error).

Without notice of the testimony that is alleged to be perjurious, a defendant would have to anticipate and rebut every possible instance of possible perjury "in a random and wasteful way by trying to anticipate and negate every conceivable ground on which the district court might choose" to base the perjury enhancement, a result the *Burns* Court set out to avoid. *Burns*, 501 U.S. at 137. In this case, for example, without the identification of the specific allegedly perjured statements, defense counsel would have to comb every page of Mr. Burchell's testimony (approximately 220 pages) and every page of Mr. Dvorak's testimony (approximately 112 pages) to determine exactly where his testimony contradicted testimony of Burchell.

Mr. Dvorak received an increased sentence without having notice in advance of his sentencing hearing of the factual basis for it. This deprivation of his liberty, without notice, deprived him of Due Process.

C. This Court Should Grant Certiorari Because of the Conflict Among the Circuits on the Necessity of Instructing a Jury that Good Faith is a Defense to Fraud Charges

"As a general proposition, a defendant is entitled to an instruction as to any recognized defense for which there exists

evidence sufficient for a reasonable jury to find in his favor." *Mathews v. United States*, 485 U.S. 58, 63 (1988). The refusal to give an instruction on the central tenet of the defense, namely, Mr. Dvorak's good faith belief in the propriety of his actions,[8] was reversible error.

The record is filled with evidence to show that Mr. Dvorak believed in good faith that he was assisting the DEA, not defrauding the DEA. Mr. Dvorak testified that he believed he was helping the DEA, and that Burchell asked him to help the DEA. This belief was supported by facts. Burchell actually worked for the DEA, and ordered goods from Ritz by transmitting DEA purchase orders that were signed by contracting officers. Ritz received payment by government checks. Ritz installed antennas at the DEA headquarters in two different years, and duplicated 8,000 copies of a training tape about DEA equipment. Burchell ordered many items that are standard fare for government agencies, such as video projectors, desktop computers, printers, and software. Relying on the comments of his older brother, a former CIA employee, Mr. Dvorak believed the non-standard items that Burchell ordered were ones that the DEA would use for undercover operations or as bribes elsewhere in the world. Other Ritz employees had seen ostensibly innocent items, such as pinball machines and lamps, being outfitted with surveillance equipment in a DEA workshop.

The jury instructions did not inform the jury on the central premise of the defense, namely, that Mr. Dvorak's honest belief that he was helping the DEA would require the jury to acquit him on the wire fraud and false statements counts. Although other instructions stated that the government had to prove Mr. Dvorak acted "willfully," instructing a jury

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[8] Good faith is an absolute defense to charges of false statements and wire fraud. *United States v. Bakker*, 925 F.2d 728, 738 (4th Cir. 1991); *United States v. Mancuso*, 42 F.3d 836, 846-47 (4th Cir. 1994). The government has not argued otherwise.

that the government must prove that a defendant intended to commit an offense is quite different from explaining to the jury how the defendant can legitimately counter the government's proof of this essential element of the crime.[9]

The jury received no guidance from the court on how to evaluate the defense that Mr. Dvorak believed, based on the comments and conduct of Burchell, that he was assisting the DEA. For example, the jury received no instruction about whether Mr. Dvorak's beliefs have to be objectively reasonable or merely subjectively sincere.[10] It would be unfair to expect a jury to divine that the law required no proof that Mr. Dvorak's beliefs were reasonable. Indeed, in a closely analogous area, the federal appeals courts disagreed among themselves on whether good faith alone provided a defense to a willful failure to file a tax return[11] or whether the refusal had to be objectively reasonable. This Court's decision *in United States v. Cheek*, 498 U.S. 192 (1991), which held that the defense to that charge required no proof of objective reasonableness, resolved this split in the circuits. *See* 498 U.S. at 197. Jurors cannot be expected to infer that "willfulness"

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[9] The trial court's refusal to give this instruction conflicted with long-standing precedent in the Fourth Circuit and elsewhere, that requires jury instructions in fraud cases where the defendant asserts that he lacked criminal intent because he relied on the advice of others. *United States v. Miller*, 658 F.2d 235, 237 (4th Cir. 1981) (reliance on expert); *Etheridge v. United States*, 932 F.2d 318, 321 (4th Cir. 1991) (reliance on government official); *United States v. Johnson*, 537 F.2d 180 (4th Cir. 1964) (advice of counsel).

[10] The proposed instruction would have informed the jury "a person who acts on a belief or opinion honestly held is not punishable under either [the wire fraud or false statements] statutes merely because the belief or opinion turns out to be inaccurate, incorrect or wrong." (A. 87a-88a). The proposed instruction thus informed the jury that Mr. Dvorak's belief needed to be only "honestly held" rather than objectively reasonable.

[11] 26 U.S.C. § 7201 punishes anyone who "willfully attempts in any manner to evade or defeat any tax imposed by this title."

may be negated by a subjective good faith belief, without proof of reasonableness, when the very same issue divided the federal appeals courts. It is unrealistic to expect a jury to know the right answer when federal judges disagree on it.

The government's brief to the Fourth Circuit argued that the willfulness instruction presents the "good faith" defense by stating the government's burden to prove that Mr. Dvorak acted "voluntarily and intentionally and not because of a mistake or accident or other innocent reason." The Fourth Circuit seemed to accept this reasoning, stating that the jury instructions were "adequate." The government argued that the single word "mistake" was adequate to inform the jury that Mr. Dvorak's mistaken belief in the propriety of his actions would constitute a defense. A jury, however, may have interpreted that "mistake" to refer to mistaken actions, such as delivering the wrong goods, rather than mistaken thoughts by Mr. Dvorak. The instruction was insufficiently specific to explain how Mr. Dvorak might "legitimately counter the government's proof" under *Miller* by showing his belief that he was helping the DEA, not cheating it. The instruction was simply inadequate to "advise the jury clearly regarding the law to be applied in the case," *United States v. Lewis*, 53 F.3d 29, 33 (4th Cir. 1995) because it included no explicit reference to Mr. Dvorak's good faith. *Compare United States v. Fowler*, 932 F.2d 306, 315-317 (4th Cir. 1991) (no requirement for separate good faith instruction where court also instructed jury that it would be a defense if the defendant "believed he had authority" to act as he did, and that his belief was "reasonable under all the circumstances.")

The district court compounded the damage to Mr. Dvorak by giving a "willful blindness" instruction that the jury could find the requisite knowledge by Mr. Dvorak if it found beyond a reasonable doubt his "deliberate or intentional ignorance or deliberate or intentional blindness to the existence of that fact." (A. 91a-92a). As there was little evidence of Mr. Dvorak's direct knowledge of Burchell's intent, the prosecutor's closing argument focused on willful

blindness. (A. 114a-115a). The jury likely found Mr. Dvorak guilty based on that instruction. The court's instructing on "willful blindness" but not on "good faith" meant that the jury received imbalanced instructions that told them how they might convict but not how they might acquit.

The Fourth Circuit's decision conflicts with the decisions of other circuits. The Eighth and Tenth Circuits require a separate good faith instruction where defendant requests the instruction, the instruction is correct, the government does not object to the wording or the giving of the instruction, and the evidence supports giving the instruction. *See United States v. Casperson*, 773 F.2d 216 (8th Cir. 1985) (wire fraud); *United States v. Ammons*, 464 F.2d 414 (8th Cir. 1972);[12] *United States v. Haddock*, 956 F.2d 1534 (10th Cir.), on rehearing 961 F.2d 933 (10th Cir. 1992); *United States v. Hopkins*, 744 F.2d 716 (10th Cir. 1984) (en banc). These Circuits require a good faith instruction because "general instructions on willfulness and intent are insufficient to fully and clearly convey a defendant's good faith defense." *Haddock*, 956 F.2d at 1547 (citations omitted); *see also Hopkins*, 744 F.2d at 718.

The Second Circuit requires a balancing instruction when a court instructs, as here, on willful blindness. *See, e.g., United States v. Sicignano*, 78 F.3d 69, 70-71 (2d Cir. 1996) (Second Circuit has "repeatedly ruled" that when the court instructs on conscious avoidance, it must advise jury that it cannot find knowledge of a fact if defendant actually believed the contrary; "failure to include that proviso improperly permits the jury to convict a defendant who honestly believed that he was not engaging in illegal activity"); *United States v. Bright*, 517 F.2d 584, 588 (2d Cir. 1975) (failure to include balancing instruction to conscious avoidance was reversible error; "instruction as given was insufficient to give the jury

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[12] The Eighth Circuit has held that a separate good faith instruction is not required in prosecution under 18 U.S.C. § 1001 because it does not require proof of any intent to deceive. *United States v. Hildebrandt*, 961 F.2d 116, 118 (8th Cir. 1992).

the proper balance required" due to "the lack of juxtaposition of the choices available"); *United States v. Rodriguez*, 983 F.2d 455, 456 (2d Cir. 1993) (willful blindness instruction must include language that defendant may not be convicted if he actually believes that a particular fact does not exist; language that "a showing of negligence, mistake, or even foolishness, on the part of the defendant, is not enough to support an inference of knowledge") (citation omitted). "An instruction that the jury cannot find knowledge on the basis of mistake or accident is not an acceptable substitute for the balancing charge which incorporates the concept of actual belief." *Sicignano*, 78 F.3d at 72. Without the balancing instruction, the charge "create[s] an unacceptable risk that the defendant might be convicted in spite of his actual belief" in the propriety of his actions. Id.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

ROBERT F. DVORAK,

Petitioner,

v.

UNITED STATES GOVERNMENT,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI (VOLUME I)

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 00-4353

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROBERT F. DVORAK,
Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Albert V. Bryan, Jr., Senior District Judge.
(CR-99-412-A)

Submitted: September 20, 2000
Decided: October 17, 2000

Before WILKINS, LUTTIG, and MOTZ, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

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Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Robert F. Dvorak appeals his convictions and sentences for conspiracy, making false statements, and wire fraud. We affirm.

Dvorak owned the Ritz Audio Visual store in Beltsville, Maryland ("Ritz AV"). In that capacity, he sold numerous items to Robert Burchell, who ostensibly purchased these goods for the Drug Enforcement Agency (DEA) but in fact embezzled them. The primary issue at trial was whether Dvorak realized that Burchell was misusing the property bought by the DEA. The jury, apparently believing that Dvorak had the requisite awareness, convicted him of all nineteen counts in the indictment. The district court sentenced Dvorak to concurrent terms of thirty-seven months imprisonment, and this appeal followed.

Dvorak's first claim is that the district court erred by refusing to instruct the jury that good faith is a defense to charges of wire fraud and making false statements. The court's instructions concerning willfulness and knowledge adequately addressed this issue, however. *See United States v. Fowler*, 932 F.2d 306, 316-17 (4th Cir. 1991).

Dvorak next faults the district court for refusing to strike portions of the prosecutor's closing argument. This issue relates to hearsay evidence suggesting that Burchell resold goods the DEA bought from Ritz AV. The court did not admit this hearsay as substantive evidence of the resale of goods, but rather to show that Dvorak, who heard the statements in question, was on notice that Burchell was misusing government property. Dvorak contends that the prosecutor blurred this distinction in his closing argument. We have reviewed the prosecutor's remarks and do not agree that they had such an effect. Furthermore, because Dvorak was not implicated in any resale of property, he would not have been prejudiced by any misconceptions about the purpose for which the hearsay evidence was introduced. *See United States*

v. Wilson, 135 F.3d 291, 297 (4th Cir. 1998) (describing showing required to establish improper closing argument).

Finally, Dvorak contends that the district court failed to make the findings necessary to support its imposition of a two-level sentencing enhancement for obstruction of justice. *See United States Sentencing Guidelines Manual* § 3C1.1 (1998). The court, however, specifically identified the testimony supporting such an enhancement (Dvorak's denial that he was aware of Burchell's criminal activities) and expressly found that testimony to be false and material. These findings were sufficient. *See United States v. Dunnigan*, 507 U.S. 87 (1993).

For the foregoing reasons, we affirm Dvorak's convictions and sentences. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

FILED
____ 4, 2000
CLERK, U.S. DISTRICT COURT
ALEXANDRIA, VIRGINIA

Case Number 1:99CR00412-001

UNITED STATES DISTRICT COURT
Eastern District of Virginia
Alexandria Division

UNITED STATES OF AMERICA

v.

ROBERT DVORAK,

Defendant.

AMENDED JUDGMENT IN A CRIMINAL CASE

The defendant, ROBERT DVORAK, was represented by Alan D. Strasser, Esquire.

The defendant was found guilty on count(s) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, and 19 of the Indictment after a plea of not guilty. Accordingly, the defendant is adjudged guilty of the following count(s), involving the indicated offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 USC 371	Conspiracy to defraud the United States	8/29/97	1
18 USC 1001	Knowingly and willfully made a materially false statement and representation	2/10/95 - 9/26/97	2 thru 15

18 USC 1343	Fraud by wire	1/17/97 - 9/26/97	16 thru 19

As pronounced on April 28, 2000, the defendant is sentenced as provided in pages 2 through 7 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Signed this 4th day of May, 2000.

/s/ _____
Albert V. Bryan, Jr.
United States District Judge

Defendant's SSN: 579-78-7352
Defendant's Date of Birth: 9/12/54
Defendant's address: 8404 Cherry Laurel Court
Laurel, MD 20723

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of THIRTY-SEVEN (37) MONTHS as to each Count to be served concurrently with each other.

The Court makes the following recommendations to the Bureau of Prisons:

That while incarcerated the defendant receive medical treatment for his condition.

The defendant shall surrender to the United States Marshal for this district 48 hours after the completion of the appeal process.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

c: P.O. (2) (3)
Mshl. (4) (2)
U. S.Atty. United States Marshal
U.S.Coll.
Dft. Cnsl.
PTS Deputy Marshal
Financial
Registrar
ob

Defendant: Robert F. Dvorak
Case Number: CR 99-412-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS.

The Probation Office shall provide the defendant with a copy of the standard conditions and any special conditions of supervised release.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

While on supervised release, the defendant shall not commit another federal, state, or local crime.

While on supervised release, the defendant shall not possess a firearm or destructive device.

If this judgment imposes a fine or a restitution in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

STANDARD CONDITIONS OF SUPERVISED RELEASE

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below):

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.

2) The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

6) The defendant shall notify the Probation Officer within 72 hours, or earlier if so directed, of any change in residence.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by physician.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPEVISION

While on supervised release, pursuant to this Judgment, the defendant shall also comply with the following additional conditions:

The mandatory drug testing provisions of 18 U.S.C. § 3563(a)(5) are waived upon the courts finding that the offense of conviction is not drug-related, there is no current or past history of substance abuse, and there is a low risk of future substance abuse by the defendant.

The defendant shall pay the restitution as ordered.

Defendant: Robert F. Dvorak
Case Number: CR 99-412-001

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total monetary penalties in accordance with the schedule of payments set out below.

Count	Special Assessment	Fine
1	$100.00	
2	$100.00	
3	$100.00	
4	$100.00	
5	$100.00	
6	$100.00	
7	$100.00	
8	$100.00	
9	$100.00	
10	$100.00	
11	$100.00	
12	$100.00	
13	$100.00	
14	$100.00	
15	$100.00	
16	$100.00	
17	$100.00	
18	$100.00	
19	$100.00	
Total	**$1,900.00**	

FINE

No fines have been imposed in this case.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest (6) penalties

The special assessment is due in full immediately. If not paid immediately, the court authorizes the deduction of appropriate sums from the defendant's account while in confinement in accordance with the applicable rules and regulations of the Bureau of Prisons.

Any special assessment. restitution, or fine payments may be subject to penalties for default and delinquency.

If this judgment imposes a period of imprisonment, payment of Criminal Monetary penalties shall be due during the period of imprisonment.

All criminal monetary penalty payments are to be made to the Clerk, United States District Court, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program.

RESTITUTION AND FORFEITURE

RESTITUTION

The court. pursuant to the Victim and Witness Restitution Act, finds that the following is/are victim(s) of defendant's criminal conduct and has/have sustained loss in the indicated amounts and orders $1039.93 restitution by the defendant as follows:

Name & address of payee(s)	Amount
General Accounting Unit, DEA 700 Army Navy Drive Arlington, VA 22202	$1,039,929.10
Total	$1,039,929.10

Payments of restitution are to be made to Clerk, U.S. District Court.

Restitution is due and **payable at the rate of $300.00 per month** commencing 30 days from today. Any amount due a victim to whom restitution is ordered in this order shall be reduced by any amount the victim recovers from the same loss for any co-defendant or any other source.

If there are multiple payees, any payment not made directly to a payee shall be divided proportionately among the payees named unless otherwise specified here:

FORFEITURE

Forfeiture has not been ordered in this case.

FILED
APRIL 28, 2000
CLERK, U.S. DISTRICT COURT
ALEXANDRIA, VIRGINIA

Case Number 1:99CR00412-001

UNITED STATES DISTRICT COURT
Eastern District of Virginia
Alexandria Division

UNITED STATES OF AMERICA

v.

ROBERT DVORAK,

Defendant.

JUDGMENT IN A CRIMINAL CASE

The defendant, ROBERT DVORAK, was represented by Alan D. Strasser, Esquire.

The defendant was found guilty on count(s) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, and 19 of the Indictment after a plea of not guilty. Accordingly, the defendant is adjudged guilty of the following count(s), involving the indicated offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 USC 371	Conspiracy to defraud the United States	8/29/97	1
18 USC 1001	Knowingly and willfully made a materially false statement and represenation	2/10/95 - 9/26/97	2 thru 15

18 USC 1343	Fraud by wire	1/17/97 - 9/26/97	16 thru 19

As pronounced on April 28, 2000, the defendant is sentenced as provided in pages 2 through 7 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Signed this 28th day of April, 2000.

/s/ _____
Albert V. Bryan, Jr.
United States District Judge

Defendant's SSN: 579-78-7352
Defendant's Date of Birth: 9/12/54
Defendant's address:
8404 Cherry Laurel Court
Laurel, MD 20723

A True Copy, Teste:
Norman H. Meyer, Jr., Clerk
By /s/_____
Deputy Clerk

Defendant: Robert F. Dvorak
Case Number: CR 99-412-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS.

The Probation Office shall provide the defendant with a copy of the standard conditions and any special conditions of supervised release.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

While on supervised release, the defendant shall not commit another federal, state, or local crime.

While on supervised release, the defendant shall not possess a firearm or destructive device.

If this judgment imposes a fine or a restitution in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

STANDARD CONDITIONS OF SUPERVISED RELEASE

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below):

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.

2) The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

6) The defendant shall notify the Probation Officer within 72 hours, or earlier if so directed, of any change in residence.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by physician.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPEVISION

While on supervised release, pursuant to this Judgment, the defendant shall also comply with the following additional conditions:

1) The mandatory drug testing provisions of 18 U.S.C. § 3563(a)(5) are waived upon the courts finding that the offense of conviction is not drug-related, there is no current or past history of substance abuse, and there is a low risk of future substance abuse by the defendant.

2) Pay the restitution as ordered.

Defendant: Robert F. Dvorak
Case Number: CR 99-412-001

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total monetary penalties in accordance with the schedule of payments set out below.

Count	Special Assessment	Fine
1	$100.00	
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14	$100.00	
15	$100.00	
16	$100.00	
17	$100.00	
18	$100.00	
19	$100.00	
Total	**$1,900.00**	

FINE

No fines have been imposed in this case.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest (6) penalties

The special assessment is due in full immediately. If not paid immediately, the court authorizes the deduction of appropriate sums from the defendant's account while in confinement in accordance with the applicable rules and regulations of the Bureau of Prisons.

Any special assessment. restitution, or fine payments may be subject to penalties for default and delinquency.

If this judgment imposes a period of imprisonment, payment of Criminal Monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the Clerk, United States District Court, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program.

RESTITUTION AND FORFEITURE

RESTITUTION

The court. pursuant to the Victim and Witness Restitution Act, finds that the following is/are victim(s) of defendant's criminal conduct and has/have sustained loss in the indicated amounts and orders $1039.93 restitution by the defendant as follows:

Name & address of payee(s)	Amount
General Accounting Unit, DEA 700 Army Navy Drive Arlington, VA 22202	$1,039,929.10
Total	$1,039,929.10

Payments of restitution are to be made to Clerk, U.S. District Court.

Restitution is due and **payable at the rate of $300.00 per month** commencing 30 days from today. Any amount due a victim to whom restitution is ordered in this order shall be reduced by any amount the victim recovers from the same loss for any co-defendant or any other source.

If there are multiple payees, any payment not made directly to a payee shall be divided proportionately among the payees named unless otherwise specified here:

FORFEITURE

Forfeiture has not been ordered in this case.

1:99-cr-00412

Alan D. Strasser, Esq. agil
Kutak Rock
1101 Connecticut Ave NW
Suite 1000
Washington, DC 20036-4374

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

CRIMINAL NO. 99-412-A

UNITED STATES OF AMERICA

V.

ROBERT DVORAK,

Defendant.

ORDER

For the reasons stated from the bench, it is hereby

ORDERED that the motions of the defendant for a new trial and judgment of acquittal are denied.

/s/
Albert V. Bryan, Jr.,
United States District Judge

Alexandria, Virginia
April 28th, 2000

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

CRIMINAL NO. 99-412-A

UNITED STATES OF AMERICA

V.

ROBERT DVORAK,

Defendant.

FINDINGS AND REASONS

Pursuant to F. R. Crim. P. 32(c), the defendant alleged the following inaccuracies in the presentence investigation report (PSI):

The defendant controverts the statements regarding the offense conduct in paragraphs 10-13, 15, 17, 18 and 20 of the PSI. The court finds the statements in those paragraphs are correct.

The defendant controverts the statement in paragraph 23 as to the amount of loss and restitution. The court finds the amounts set forth in that paragraph are correct as being an amount reasonably foreseeable to the defendant as involved in conspiracy at the time he became a party in the conspiracy. However the amount of restitution should be $1,039,929.10 instead of $1,144,034.07.

The defendant controverts the statement in paragraph 29 as to obstruction of justice. The court finds an obstruction of justice enhancement is appropriate for giving false material testimony at trial.

The defendant requested a downward departure under U.S.S.G. § 5H1.4. The court finds such a departure is not warranted.

Pursuant to 18 U.S.C. § 3553, the court sets forth the following findings in connection with the sentence this day imposed:

The unadjusted severity level for the offense for which the defendant has been found guilty is 6, increased by 11 because of the amount involved (more than $800,000), increased by 2 for obstruction of justice, increased by 2 for more than minimal planning, results in an offense level total of 21 with a criminal history category of I, this results in a range of punishment of 37 to 46 months, a supervised release term of years, and a fine range between $7,500 and $75,000.

Restitution was ordered in the amount of $1,039,929.10 to be paid to the Drug Enforcement Administration at the rate of $300 per month, such payment to begin 30 days from this date. The court finds the defendant's resources and earning capacity as referenced in the presentence report, taking his own needs and the needs of those dependant upon him, are sufficient to enable him to make these payments. Neither fine, costs of imprisonment, nor costs of supervised release was ordered because the defendant's resources are such that he can not afford pay them in addition to the restitution.

The court adopts paragraphs 8-22, 23 except as to the change in the amount of restitution, 24-28, 29 as amended and 30-61 of the presentence investigation report.

The court imposed concurrent sentences of 37 months incarceration and 3 year terms of supervised release on Counts 1-19. The court further imposed a $100 assessment per count for a total of $1,900 due immediately. The court imposed as a condition of the supervised release that defendant pay the restitution as above set forth. The court recommended waiver of substance abuse treatment and testing as a condition of supervised release.

/s/_____
Albert V. Bryan, Jr.,
United States District Judge

Alexandria, Virginia
April 28th, 2000

COPY

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

CRIMINAL ACTION
NO. 99-412-A
Friday, April 28, 2000
Alexandria, Virginia

UNITED STATES OF AMERICA

-vs-

ROBERT F. DVORAK,

Defendant.

Transcript of sentencing proceedings in the above-captioned matter.

BEFORE:

The Honorable ALBERT V. BRYAN, JR., Judge
United States District Court

APPEARANCES:

FOR THE UNITED STATES:

STEPHEN P. LEARNED, ESQ.
DABNEY LANGHORNE, ESQ.
UNITED STATES ATTORNEY'S OFFICE
2100 Jamieson Avenue
Alexandria, Virginia 22314-5794

* * *

DON McCOY, RMR
OFFICIAL COURT REPORTER
(703) 683-3668

APPEARANCES: (Continued)

FOR THE DEFENDANT:

ALAN D. STRASSER, ESQ.
NANCY NUNAN, ESQ.
KUTAK ROCK, LLP
1101 Connecticut Avenue, N.W.
Washington, D. C. 20036

C-O-N-T-E-N-T-S

WITNESS: DIRECT CROSS REDIRECT RECROSS
(None)

ARGUMENT BY MR. STRASSER PAGE 3, 11, 35
ARGUMENT BY MR. LEARNED PAGE 5, 26

COURT'S RULINGS PAGE 8, 39

P-R-O-C-E-E-D-I-N-G-S

THE CLERK: Criminal No. 99-412-A, United States vs. Robert F. Dvorak.

MR. LEARNED: Good morning, Your Honor; Steve Learned for the United States.

Dabney Langhorne may be able to join me later. She's in Judge Hilton's court, I believe.

MR. STRASSER: Good morning, Your Honor; Alan Strasser for Mr. Dvorak, who is present, and with me is also my colleague, Nancy Nunan.

THE COURT: There is before the Court the motion for a new trial, or, in the alternative, for judgment of acquittal. I expect it's the other way around. But do you want to be heard further on that? It's been pretty well briefed, but if you want to address it further, now is the time.

MR. STRASSER: Your Honor, I am prepared to argue it. I think it might be helpful if I knew whether the Court had questions that it wanted me to address so I could focus my remarks.

THE COURT: No. I have considered everything -- at least I have tried to consider everything you have submitted -- and I have to say this, that your motions both in essence boil down to what you assert is the unbelievability of Mr. Burchell.

There are other matters, too, the instruction or the failure to give the good-faith instruction and the remarks of

Mr. Learned or his co-counsel before the jury. But I know what you are bringing up. I'm not sure I agree with all of them, but I don't have any questions about them.

MR. STRASSER: I think they fit together, Judge. I agree with the Court's description of our motions, but the points fit together, given what I believe was Mr. Burchell's lack of credibility as a witness.

THE COURT: The jury didn't have any problem with it, obviously, and frankly neither do I, or did I. He was a liar, and he was a thief, but his testimony came across as fairly credible. And it was vigorously attacked and capably attacked by you. But I must say I found it convincing, which I'm sure is a blow to you, but I would be less than candid to look at you and act like I was being convinced that he was unbelievable.

MR. STRASSER: I appreciate that, Your Honor. Then our argument boils down to what the Court described as instructional error, and the misstatements by the Government in closing argument.

THE COURT: Did you object to those statements at the time?

MR. STRASSER: I objected to the comments about McLean Bible Church. The misstatements about Mr. Burchell's expectations, I do not believe I objected to during closing argument.

THE COURT: I didn't think so, and I knew that you had objected to some, but I couldn't remember exactly which ones.

MR. STRASSER: It was a circumstantial case with accomplice testimony. The Government's arguments, the Government's arguments carry a lot of weight simply because they come from the Government.

If the jury evaluated the evidence without knowing the that good faith was a defense for Mr. Dvorak, their assessment of Mr. Burchell's credibility, I think, is hard to determine, and that really is the essence of our request for a new trial.

Thank you, sir.

THE COURT: Mr. Learned, did you want to respond to any of that?

MR. LEARNED: Your Honor, I don't think it's necessary. I filed a lengthy brief. The good-faith instruction, Your Honor, the one he submitted and that he wanted read, I guess, only dealt with counts 2 through 19. It specifically left out the conspiracy count. So had the Court given that instruction as given, you know, it didn't apply to the conspiracy count. So, therefore, he can only overturn, the only thing that could be overturned would be counts 2 through 19.

THE COURT: Well, that's a fair number of counts.

MR. LEARNED: Well, that's, but I mean, the bottom line is that we feel the Court's instruction clearly covered it.

Obviously, had the jury believed Mr. Dvorak, they would have been compelled to acquit him on the instructions that Your Honor gave.

You told the jury that they could not convict him if what he did was by mistake or accident or words to that effect. I have cited the precise language, and obviously had they believed him, they would have been duty bound on the instruction you gave to acquit him. The same thing with the willful blindness instruction, the instruction specifically said, you know, you cannot convict this man, ladies and gentlemen, on the basis of negligence or carelessness.

Had they believed Mr. Dvorak, in his testimony that he was, you know, mistaken, maybe careless, not careful enough, they would have been duty bound. So it's our view that the instruction was weighed. I don't need to go into that, but also we feel that it was adequately covered.

Ms. Langhorne, my colleague, did in rebuttal argument appear to overstate, misstate -- I will say misstate or go beyond what Mr. Burchell had testified to about his own expectations about a reduction in sentence. That was a mistake. That happens to attorneys in final argument.

It was not objected to, and that was a significant factor, because when counsel makes an objection to the Government in their opening statement, the Government has the opportunity to rethink. When you are a prosecutor and someone objects to what you are saying, you can step back for a minute, had there been an objection, and Ms. Langhorne could have corrected it, could have told the jury, ladies and gentlemen, your recollection controls and so forth. The Court could have stepped in. There was no objection.

Certainly, this doesn't rise to the area of plain error. As I pointed out in my opening final argument, the very first paragraph of my opening statement was to remind the jury that their recollection of the evidence is what counts, and that attorneys sometimes mistakenly misstate the evidence.

So I think we have adequately addressed those issues, and I believe frankly that we haven't really addressed the specific issue of whether or not a stay is appropriate of sentencing, but I think that any appeal here would be for purposes of delay only. There really is no --

THE COURT: (Interposing) Well, we haven't reached that point yet.

MR. LEARNED: Right.

THE COURT: Well, on the motions for a new trial and for judgment of acquittal, the motion for a new trial is a little different standard. It's whether the evidence, whether the verdict is against the weight of the evidence, and whether the interests of justice require a retrial.

And, as I indicated to counsel, a lot of the weight-of-the-evidence argument is the asserted unbelievability of Burchell.

The jury found him believable, and so did I. I can't find that this verdict is against the weight of the evidence or is not in the interest of justice.

Insofar as the improper remarks of the Government, they were fairly innocuous, I think. The misrepresentation or misstatement as to Burchell's expectations of a further reduction of sentence were not objected to.

Had they been objected to, I would have instructed the jury that it was their recollection of the evidence that counts.

The jury was instructed that statements and argument of counsel are not evidence in the case. And the McLean Bible incident, it seems to me, is trivial and certainly innocuous.

As to the good-faith proffered instruction, I don't think a good-faith instruction is necessary where the Court gives an adequate willfulness instruction as one of the elements the Government must prove.

The jury was instructed that in order to convict under any of these offenses, one of the elements that the Government must prove was that the defendant's activity was willful.

The Court defined willful as being voluntary and intentional and with a specific intent to do something the law forbids, that is, with the bad purpose to either disobey or disregard the law, and not because of mistake or accident or other innocent reason.

If they had to find that it was with a bad purpose to disobey or disregard the law, that it seems to me negates any good faith and is adequate even in the absence of a good-faith instruction.

Motion for judgment of acquittal is a little different standard. It is, of course, whether giving the Government the benefit of all reasonable inferences, no jury could have convicted the defendant.

As I say, some of the same things are addressed in that motion, that is, the good-faith instruction, the failure to give a good-faith instruction, the believability of Burchell and whether literal falsity has been proved, and materiality.

It seems to me the argument that literal falsity and materiality has not been proved is a little disingenuous. The whole method of this scheme was to disguise the manner in which the invoices were worded, so that the responsive agency official would be misled into possibly thinking that these were legitimate purchases.

But even with that, the boat, the camper -- I mean the trailer, the computers, the laser disks containing pornography, it was false, and clearly false, and the jury was

not hoodwinked by that, nor the clever way of wording the invoices.

And they were designed so that the -- they were calculated so that they would induce agency action, and that, of course, is the essence of materiality.

So I find that neither the motion for a new trial nor the motion for judgment of acquittal should be granted, and those motions will be denied.

That brings us to sentencing, and there are several matters that counsel have brought to my attention as far as the asserted errors in the presentence report, but initially, Mr. Dvorak, have you had an opportunity to go over the probation report with your attorneys?

THE DEFENDANT: Yes, Your Honor, I have.

THE COURT: Have you seen the errors that they have addressed, the asserted errors?

THE DEFENDANT: Yes, sir, we have discussed them.

THE COURT: Are there any other matters in the report with which you disagree?

THE DEFENDANT: No, sir.

THE COURT: All right, sir. Then, counsel, you want to address the calculation of the loss and the obstruction of justice.

You also, of course, disagree with the offense conduct which is, as you point out, the Government's version which both the jury and apparently the Court accepted, but if you want to address in more detail the calculation of the loss or the obstruction of justice, I'll hear you on that.

MR. STRASSER: Thank you, Your Honor.

Your Honor, I also would wish to address the restitution issue.

THE COURT: Well that's tied in with the calculation of the loss, and you also request a downward departure under Guideline 5(h)1.

MR. STRASSER: Let me begin with the calculation of the loss. My fundamental objection to the calculation of the loss that's proposed by the Government and accepted by Ms. Blanchard, is that it rests essentially on the word, the post facto word of Mr. Burchell of saying, I stole that, I stole that, I stole that, I stole that, and therefore, Mr. Dvorak is responsible for it.

It essentially comes down to what I think is arbitrary, to Burchell saying after the fact those are the things I stole. But the guidelines don't make the loss calculation turn on the same principal as the principal of criminal liability, but instead require a certain element of foreseeability.

I will not talk about the foreseeability on the laser disks or the boat or the camper that the Court just referred to, but on the other items, there are items that are like the ones that Ritz sold to the DEA and sells to other Government agencies, computers, televisions, computer monitors, video projectors, standard audiovisual equipment, much of which Ritz sold to DEA, and Burchell, it turned out, stole.

Saying that Mr. Dvorak is responsible for all of that is to say that he knew in advance what Mr. Burchell was doing, and that is the point that we contest. But even Burchell's testimony didn't suggest that he told Mr. Dvorak as to each item.

THE COURT: No, I'm sure he didn't. Everybody seemed to sort of, don't ask any questions.

MR. STRASSER: That's it, Judge. That is what swayed the jury is the willful blindness instruction, the conscious avoidance instruction, that the jury looked at this in hindsight and said, Mr. Dvorak should have asked some more questions. He should have done more, and since he didn't, he is guilty of a crime. But not asking questions is different than knowing. It's different than foreseeing.

THE COURT: But it can be conscious avoidance.

MR. STRASSER: Your Honor, I agree that it could support a finding of guilt, but that's different than reasonable foreseeability, which is the standard under the guidelines. And that is why we have distinguished from the vast majority of that equipment, three-quarters of it, which is pre-standard audiovisual equipment that we contend was not foreseeable that Mr. Burchell was stealing.

It is not the kind of stuff you use in your house. It is commercial equipment. It is used in courtrooms and in corporate presentations. It is just not the sort of equipment that a person takes, and so we suggest that it is unfair under the guidelines to attribute all of that loss to Mr. Dvorak.

On the obstruction question--

THE COURT: (Interposing) I might tell you in advance, I'm not as concerned on the obstruction of justice aspect on the failure to, on the document that allegedly was not produced in response to the subpoena. That could go either way. I'm willing to give the defendant the benefit of the doubt on that.

But I do think there is a legitimate issue whether he took the stand and lied, and that would be, if I find an obstruction-of-justice enhancement, appropriate, it would be on that prong that is mentioned in the presentence report.

MR. STRASSER: That is a prong that the Government has not argued. The Government's sentencing memorandum seeks the enhancement only on the document.

THE COURT: But I'm not bound by what the Government does.

MR. STRASSER: Of course not. But I think then there is a question of notice to Mr. Dvorak about what precisely was the false testimony that he was supposed to have given. The presentence report is not illuminating on that point.

To be sure, Mr. Dvorak said he was not guilty of the offenses.

THE COURT: That he didn't know anything about any of this, what these -- was not aware that these purchases were not legitimate DEA purchases.

MR. STRASSER: That he believed otherwise, I think was his testimony.

THE COURT: Yes.

MR. STRASSER: And I guess I don't -- (pause).

THE COURT: And that was the issue in the case, really, whether he acted willfully.

MR. STRASSER: I agree, Your Honor.

THE COURT: There wasn't any question that these items were stolen by Burchell, and so the real issue in the case was whether the defendant knew that they were being stolen or misinvoiced, or whether he believed to the contrary.

MR. STRASSER: And that's why I think the willful-blindness instruction was so important to the jury's verdict, because looking at it with the safety of hindsight, the jury could say you should have -- to Mr. Dvorak -- you should have asked for questions. You should have pressed Burchell. When Burchell said, It's not for you to know, you should have said something to that, or you should have called somebody else.

Now, to my mind, the great irony, of course, is had Mr. Dvorak say called Mr. Bucklin or Mr. Whiteside, Mr. Burchell's supervisors, who were in on the scheme, too, it would have done no good at all. But that also is with hindsight. It's not something that Mr. Dvorak knew at the time.

Put another way, Your Honor, I think Mr. Dvorak's testimony about what he believed at the time is not even inconsistent with what Burchell said, but I think the jury sized that up and said, You may actually have believed that, but you

should have asked more. You should have gone farther than that.

There were, I suppose, in the jury's mind enough red flags so that Mr. Dvorak should have taken affirmative steps to find out what Burchell was doing, but none of that makes any of his testimony false.

I suggest his testimony, or put another way, his testimony could have been true, and the jury could have said, Well, even if we believed every word you said, under the instruction as given, we can find you guilty for your conscious avoidance of knowledge.

And that, that says to me there is nothing here -- I have overstated -- there is an inadequate basis for an enhancement for obstruction of justice for perjury, no particular false statement, no statement made with the intent of interfering with the proceedings. Mr. Dvorak testified to what he believed.

The jury said, That wasn't enough, what you believed.

So, I suggest to the Court that an enhancement for perjurious testimony in this case is little different than an enhancement for a denial of guilt. It is different than the cases where someone testifies a transaction didn't happen. The police didn't take the drugs off me. I didn't sign that document.

Those kinds of cases where the perjury is clear, it is provable, this wouldn't be a provable perjury case, just a conflict in testimony between two witnesses. So I don't think that an enhancement for obstruction is warranted.

Does the Court wish me to address the restitution issues now?

THE COURT: To the extent you think it's different from the amount of the loss, yes.

MR. STRASSER: Only two points on that, Your Honor: One is I believe there is an ex post facto issue here in the application of the Mandatory Victims Restitution Act to conduct that occurred before the effective date of the act.

THE COURT: I suggest that the law on conspiracy is that if the conspiracy straddles the effective date that its post effective date is applicable without any ex post facto problem. You disagree with that?

MR. STRASSER: Your Honor, I would agree that the conduct after the effective date would be subject to the statute, just as the conduct that's in the false statements count that occur after the effective date of the statute is subject to that statute.

But the conduct before -- well, I guess my answer on that is there isn't binding precedent in this circuit that holds that the conspiracy count does, that the act does apply to a conspiracy that straddles it. I think other courts, including the D.C. Circuit, have suggested that there is an ex post facto issue there.

The second issue on restitution is the extent of the Government's recovery of the identical items. We suggested in our objections to the presentence report, and again in our submission to this Court, that the Government had recovered pretty much everything.

The Government responded to that by saying, We did not, that there was recovery of only a certain amount of property as a, quote unquote, administrative forfeiture.

But the Government's valuation of that property is undertaken at Mr. Dvorak's detriment. That is, some of the property recovered both from Burchell and from Michael Hendrix is the identical property that Ritz sold to Burchell, which, when the DEA bought it, was valued at one level; but

when the DEA recovered the identical property, it was valued at about a third of that.

The Government suggests that there is no basis to credit Mr. Dvorak for restitution purposes for property that is recovered through administrative forfeiture.

And Mr. Learned handed to me this morning the Fourth Circuit's decision in United States vs. Alalade, A-L-A-L-A-D-E, which is at 204 F 3d 536, which is a case in which the defendant forfeited property administratively and then argued that he ought to be credited for it in the calculation of restitution.

What the Court said is he would not be credited for that recovery when there was no evidence that the victims had actually received it. In that case the victims were banks.

Footnote five of the opinion carefully states that the Court reserves the question of what effect it would have if the administrative recovery had actually gone to the victim. In the case before this Court it is the same institution that forfeited the property and recovered it; that is, it is the Justice Department.

So all of that has gone exactly to the victim of the offense, and I suggest ought to be credited and not at the value that the Government attributed to it based on an undisclosed standard.

THE COURT: What does your calculation of that do to the restitution amount that the presentence report recommends? By how much does it reduce it?

MR. STRASSER: Your Honor, I don't have a calculation of it since I just saw the Government's answer on this in the last couple of days. I would say the difference is some hundreds of thousands of dollars. The Government's submission -- if I may have the Court's indulgence one

moment -- the Government's submission on Wednesday reported a number.

THE COURT: $1,039,000?

MR. STRASSER: But not as the value of the property recovered. What the Government reports is the value of the property recovered is $476,000 and some odd. That $476,000, some fraction of that, probably half, is undervalued, I would say, by two-thirds.

The Government also says that electronic equipment valued at $33,000 was obtained from Hendrix. Now, I have not had the chance to go back to Mr. Hendrix's plea agreement and figure out how the Government derived the number of $33,000.

What I can tell from looking at Mr. Hendrix's plea agreement is that there's a column on it that lists the invoice cost of the property, which totals about a half million dollars and then a column that lists the value of the property, which has it at about $200,000, a little bit less than $200,000. That's where I get the figure that is understated by approximately two-thirds.

This is a rough calculation, to be sure, but that suggests to me that the Government recovered about $100,000 worth of property from Hendrix and somewhere around $800,000 or $900,000 worth from Burchell.

I did not see on the plea agreement for Burchell some valuation of other property that he had forfeited to the Government. He testified that he had forfeited his DEA pension.

THE COURT: He's been ordered to make restitution in a substantial amount. It's in one of your pleadings, but I can't remember which.

MR. STRASSER: I think it's $2.6 million, Your Honor, and the Government represents that he has made restitution of $79,000.

It is impossible to tell from what the Government has provided whether that includes the present value of the annuity that represents his pension for his expected life span. He is a man in his fifties. I would expect that that annuity would be worth some substantial amount of money. None of that is -- that is recovered by the Government, but not credited to Mr. Dvorak.

And that's why we said in rough terms the Government has recovered everything already from Mr. Burchell and from Hendrix.

The Government has also forfeited, and I believe Mr. Burchell testified that he lost his houses to the Government. I frankly do not remember seeing that valued in the plea agreement either.

That is my argument on the restitution point.

THE COURT: Do you want to be heard on the downward departure?

MR. STRASSER: I do want to be heard on that, Your Honor.

We seek a downward departure for Mr. Dvorak for two reasons. The primary reason is an extraordinary physical impairment, but that first reason links to the second reason, which is that he would be unusually vulnerable in prison. And let me talk briefly about that second one first. He is not a large man. He is not a tall man or heavy man, and he is by no means a strong man. He is hampered by having to carry around with him this breathing apparatus that he has with him in court. And I suggest that that alone would make him vulnerable in prison.

But the more compelling reason to my mind is the difficulty that he has in breathing, which he has felt the symptoms of it over the last months, but having the reluctance that I think is not unknown among certain males, he didn't go to the doctor to find out what it is about.

And having gone to the doctor after the trial to learn about his health, he learned that he had a serious breathing problem that has gotten worse through his life and could be expected to continue to get worse. It comes from the scoliosis that he has, which has the effect of compressing his lungs.

It means that he can't walk any substantial distance. It means he can't carry things. During the trial even, he was unable to carry -- we had notebooks galore during the trial filled with all manner of documents, and Mr. Dvorak was unable even to carry one of those.

During the trial when we decided to leave the courthouse for lunch and go to the carryout that's just one block away, Mr. Dvorak was unable to walk that distance. It affects his life, and this was even before he went to the doctor. He just knew he couldn't walk that distance.

He now has with him when he's at work this portable breathing apparatus. He has at home an oxygen generator, which is a stationary device that has a very long hose on it.

Even that has not proved adequate for him to be able to breathe adequately at night. And when Dr. Elson saw Mr. Dvorak again yesterday, he prescribed for him what is called a noninvasive ventilator for use at night.

I have spoken to the respiratory therapist about this, who tells me that it is a mask that fits over, that's strapped to one's face and then attached to a device that generates oxygen, and that would permit Mr. Dvorak to breathe at night.

The implication of this impairment for Mr. Dvorak is there is basically nothing that he can do in prison. He can't

walk. He can't carry. He can't climb. There is virtually no activities that he could undertake.

We spoke to Mr. Hicks in the Bureau of Prisons, apparently the same person that Mr. Learned spoke to, about what prisons in the Federal system could accommodate Mr. Dvorak with this medical problem. Mr. Hicks told us there were two, the one in Lexington, Kentucky, and the one in Rochester, Minnesota.

He said that he expected that there would be another one open in Massachusetts, but that wouldn't be ready until the end of the year.

What strikes me about it, though, is that sentencing Mr. Dvorak to one of those prisons would mean essentially putting him in the cell, either in his bed or in his chair, for the entire duration of whatever sentence the Court would impose, because there would not be anything else that he would be able to do in the prison.

I wonder whether that is really a wise use of the taxpayers' money. I wonder, given the nature of the offense here, whether that is something that is required for punishment of Mr. Dvorak. He has not had anything to do with the Government or Government customers in a year, something that Ritz undertook as a precautionary measure, not knowing what would happen in this case.

He obviously poses no danger to anyone. When I say that, I don't mean to minimize the offense. The jury found him guilty, and the Court has made clear its view of the evidence. I do not mean to suggest that Mr. Dvorak's conduct is de minimis.

But I do mean to suggest that the guidelines permit recognition of the extraordinary impact that the service of a sentence would have, and this would be. This would be in essence solitary confinement. This would be basically sitting in a jail cell for the entire duration of the sentence.

I suggest that the public would be better served, and the issues of deterrence would be better served by not forcing the taxpayers to bear that burden, but instead sentencing Mr. Dvorak either to a halfway house or to home detention, with other appropriate requirements. So we would ask the Court to depart downward to a sentence that would permit that.

When we spoke to Mr. Hicks in the Bureau of Prisons, and should the Court disagree with me, let me ask then as to the next step. Mr. Hicks said it was important that Mr. Dvorak be permitted to surrender voluntarily to the prison, because he said it would take some time to arrange for suitable transportation. So that frankly was his suggestion and not ours.

In any event, should the Court disagree with our recommended sentence, and we would ask the Court first to release Mr. Dvorak pending an appeal, as we do intend to note an appeal, and if the Court is unwilling to do that then to order that he surrender voluntarily to the Bureau of Prisons upon notification from the marshals.

But I hope we don't get to that point. I hope the Court agrees that a more suitable sentence would be one in a halfway house or home detention, and that is the sentence that we ask the Court to impose.

THE COURT: All right.

Mr. Learned, on the presentence report objections, an item that concerns me is whether or to what extent there ought to be credited against the restitution directive the value of recovered assets. You have a fairly minimal figure on that.

MR. LEARNED: Yes, Your Honor.

THE COURT: And counsel suggests it ought to be more.

MR. LEARNED: Yes, let me address that. Your Honor, if I may submit to the Court, and I apologize, I came across this Fourth Circuit case that came down in late February of this year, U.S. vs. Alalade, which backs up the Seventh Circuit opinion, Emerson, on specific administrative forfeiture is not an offset. I believe on page three of that opinion, Your Honor, if you look at the second column, on page three, the bottom, the first full paragraph, page three, on the right-hand side, you can see it:

We fully agree with the Government that the plain language of the MVRA did not grant the District Court discretion to reduce the amount of restitution required of the order by an amount equal to the value of the property seized from the defendant here and retained by the Government in administrative forfeiture.

In other words, I mean forfeiture is an entirely different remedy. It's not mutually exclusive. Now, that's the law. I apologize for not bumping into that case until just the very last minute.

But again, dealing with this issue of the value of the property now, to give the Court historical perspective. Mr. Burchell pleaded guilty to a major conspiracy to defraud the United States. He was involved with other people. He was involved with another vendor who had nothing to do with Mr. Dvorak.

What the department did with him when he was debriefed was to lay out on the table all the invoices that he was involved with, and he identified the items which he embezzled, and those items were paid for by the Drug Enforcement Administration to the tune of $2.68 million.

Now, at the time of the search warrant the Government seized all kinds of things, seized a host of movies and music, equipment and so forth, bank accounts, cars.

As I understand it, the forfeiture unit has valued what it seized from him at $476,000. Now this is not inflated dollar figures. This is not what DEA paid -- this is the value. The Government has valued, and I don't know exactly how they do it, the forfeiture unit. They take a big-screen television set, and I don't know whether it's still in the box or not, but they put a dollar on it.

Obviously, the bank accounts they seized, but everything they seized from him and administratively forfeited, which simply means that he did not contest, that's what that means, was valued at $476,000.

Now what did all that include? I don't really know, Your Honor. I know that it includes some bank accounts. It included, I think, at least two cars. You cannot administratively forfeit a house. That's real estate. That has to be done differently.

The financial litigation told me that he has paid or he's credited with $79,000 payment on his $2.6 million restitution, and I do know that he lost his pension, not his military pension. He's a retired military guy, and he is still apparently eligible for that, but his Government pension, because he had like 25 years in or 20 years in with the Drug Enforcement Administration. He gave that up. I don't know exactly where that fits. I don't know whether that would be deemed to be administratively forfeited. That might be where it is, or it might be in the $79,000.

But that's all the Government has to show for Mr. Burchell, $476,000, and then $79,000. He's admitted to $2.6 million worth of fraud.

Now, this Mr. Hendrix was a coconspirator on the Dvorak matter as well as some other things. When they went in, and we actually didn't do a search warrant on his house, but he pleaded guilty. He had a lot of equipment. Now he had been selling equipment. He had a lot of equipment. We administratively forfeited $33,000 of his stuff.

And then Jean Burchell, who to a minor degree, played a role in this case. She was the ex-wife of Burchell. She worked at DEA. We forfeited her Jeep Cherokee because Burchell told us that money he used from embezzling the equipment he bought her the car. So we embezzled (sic) her car. So the Government has collected, you know, add the figures up. We are talking about maybe $600,000 or something out of the $2.68 million loss.

So that's where the Government is, and, you know, I don't know how else to explain it other than that. The law is clear in my opinion, particularly with this Fourth Circuit opinion. I mean, you know, you don't get credit.

Even Burchell himself didn't get credit for his forfeitures. He got stuck with the full restitution, and all this equipment and bank accounts and cars and everything went. He didn't get credit for that.

I hope that addresses that issue, Your Honor, if I might move on to some other issues.

THE COURT: All right.

MR. LEARNED: I want to address this allegation that I misrepresented to the Court my conversation with Dr. Elson. When I read counsel's sentencing memorandum, the whole thrust of this memorandum is that the defendant is so severely limited, is such in bad physical shape that he can do nothing useful virtually, and that, you know, he can't do any menial jobs. He can't even do his own laundry. He can't put -- he's in such bad shape he can't put clothing into a laundry machine and push a button and pour some cleaning fluid in it.

But, in any event, the key thing that counsel said was that the Court would be sentencing Mr. Dvorak to a prison hospital bed. Now that to me was a gross distortion, and what that implied was that medical professionals at the

FCI would look at Mr. Dvorak and say, Well, you know, you are in such bad shape you belong in a wheelchair or a bed. That's it.

And Dr. Elson specifically rejects that conclusion, and I stand by that. Even in his counteraffidavit he says confinement to a bed is completely inappropriate for this man. And that was the conversation I had with him.

I mentioned a wheelchair. I said, Does Mr. Dvorak belong in a wheelchair or a bed?

He says, No. At that point, he said to me, the kind of activities he's had for the past six months, he should be able to continue with his ambulatory oxygen.

Now, counsel says he can't walk anywhere. Well, he came into this courthouse for three days in the trial. It's more than -- you know, he says he can't walk more than 50 feet. It's more than that to the elevators.

He got up and testified unassisted. He can walk around. I realize he's severely limited in terms of, you know, the length of time for him to walk places and so forth. We don't deny that. Obviously, he needs ambulatory oxygen, but to say that the Court would be sentencing this man, as counsel just said a minute ago, to solitary confinement, to a hospital bed is absolutely rejected by the medical advice of his doctor, who says that is not the appropriate medical determination.

THE COURT: I don't need to hear any more about that.

MR. LEARNED: In any event, Your Honor.

So, let me just address a couple of other things. The calculation of loss, obviously, as we pointed out in our piece, the standard items, a lot of standard items were sold, but this is not dependent upon Mr. Dvorak's testimony.

Government's Exhibit 160, which was prepared by the FBI Agent Steven D'Antuono, he did a careful analysis of the description on these items that are in the internal records of Ritz versus the description on the invoice going to DEA, and he showed on that exhibit about $900,000 worth of items which were, you know, it was clear that there was a misdescription or an inaccurate description or some sort of incomplete description, which is inherently deceptive, Your Honor.

And clearly, you know, Mr. Dvorak realized that while he was selling a car stereo, that's standard for him to sell, but it's not standard for him to call it an electronic box. It's standard for him to sell a digital camera, but it's not standard for him to sell it as an optical device.

So those descriptions in the calculation of loss is really based upon the analysis of the documents, as much as anything else.

Also, we do not abandon, Your Honor, the idea that there should not be obstruction because counsel lied. The fact that I didn't argue that in my sentencing memo means that I was not going to argue what I felt to be was obvious.

The Court sat through the testimony. Mr. Dvorak testified about some specific documents. I wanted to lay the foundation for documentary obstruction, and I pointed out in my brief this specific document here where he wrote, Copy of purchase order never received, and then produced the document.

We have established, and he testified on the stand, that he did not create that writing later on at another point in time. In fact, here is the purchase order number, and on this very document it says, See purchase order. We have established that there were 35 times his order form had that documentation, yet only one time, only once does it occur that the purchase order is not available.

This Exhibit 18, as I pointed out at trial, Your Honor, was a very significant document. He took the position that Burchell somehow created this document, he had nothing to do with this document. And yet there are very suspicious circumstances just looking at the documents, which we have laid out and explained in Agent D'Antuono's deposition.

There's all these unusual coincidences that all intersect with this one transaction which he disavows, claims he had nothing to do with that invoice. That's clearly lying. But we didn't abandon that as a theory of obstruction.

We felt the Court should see the significant obstruction at the investigative level, and we laid out in very detailed form why you could conclude that and why the nature of the documents themselves and the circumstances gave very powerful corroboration to Mr. Burchell's testimony.

Obviously, he lied about, there was one conversation that Burchell testified that after he got the camper, he showed him the camper, and he testified that Mr. Dvorak came out and opened up the back and looked in the camper.

Mr. Dvorak testified he never saw the camper, never saw it, never went in and looked at it. He didn't even realize that the camper that he happened to see, you know, at some point, never went and looked at it, never made the connection, never made the connection at all. He had trailers on the back of his cars. Never made the connection.

He testified that, I mean there are numerous instances, Your Honor, that was just direct testimony, you know, in direct contradiction to what Mr. Burchell said. So we think that obstruction, this is a clear case of it. Of all the cases that I have tried, I can't think of a better case really.

So, again the conspiracy straddles this mandatory act, and again, I think the forfeiture item is just a separate remedy.

I can't think of any other matter, Your Honor. I think I have addressed those, unless the Court has a question.

THE COURT: Mr. Strasser, do you want to respond to any of that?

MR. STRASSER: I do, Your Honor.

Let me start with the obstruction. I don't think the contradiction between two witnesses' testimony is enough to support an obstruction enhancement. Mr. Learned has advanced the proposition that the uncorroborated testimony of Mr. Burchell about the camper or the trailer or seeing some document would be enough for an obstruction enhancement as against Mr. Dvorak.

I don't think the guidelines are intended to heap additional punishment on a defendant who contradicts a Government witness. The jury didn't have to accept a word of that testimony from Burchell to have found Mr. Dvorak guilty. So there is no way to tell what the jury found on that question. I don't think it could turn on who the Government finds more believable.

On the restitution issue, the Government correctly quoted from the decision that it provided to me this morning and to the Court this morning, but it omits any reference to the last footnote in the case, which reserves precisely the issue in this case, that is, once the victim receives the value of the forfeiture, should the District Court credit that toward the restitution? And, of course, the victim has in this case. It is the same entity that is receiving the restitution and the administrative forfeiture.

The statute provides that once the Court has set a restitutionary amount, it should then reduce the restitutionary amount by any amount the victim has recovered through civil litigation.

It seems to me that it would be the height of irrationality for the DEA to be able to recover these items through administrative forfeiture. Mr. Dvorak does not get credit for that. As to the DEA recovering it through civil litigation, then Mr. Dvorak does get credit for that.

As to the evaluation of the items, I can't tell on what basis the forfeiture unit valued them either. I know from the discovery that the Government provided in this case that, when the FBI came to Mr. Burchell's house in October of '97, it seized a variety of items. And to suggest that those items -- then the Government had them from that point forward. Then to suggest that they ought to be --

THE COURT: (Interposing) Going back to your restitution issue just a minute, was anything forfeited that was seized from the defendant?

MR. STRASSER: No.

THE COURT: Do you sense a problem with giving him any advantage from things that were seized from somebody else? Why should he get -- (pause)?

MR. STRASSER: It's the same, well, the fundamental problem, of course, is Mr. Dvorak didn't get anything to begin with. It all went to his company, not to him. He literally could not pay it back, because he didn't get it to begin with, and that's really the problem that I think I'm addressing first.

But, secondly, how many times can the Government recover for the same loss? The statute provides that the Court could order the return of the property itself. Well, Mr. Dvorak doesn't have control of that, but the Government has control of it. It seized a lot of it from Mr. Burchell back in October of

'97 and has had it ever since. And if that would satisfy Mr. Dvorak's restitution obligation, that is the return of the property itself, I don't see why he should not get credit for it.

THE COURT: Okay.

MR. STRASSER: I don't think the statute also puts a limit on who the recovery should be from in the civil litigation. Again, it's a question of how many times should the Government recover for it?

As to the point about sentencing Mr. Dvorak to a hospital bed, I did not mean to suggest in my sentencing memorandum that he would be sentenced to bed rest. His doctor says that is not appropriate. What I do suggest, though, is that the range of activities that's available in prison is pretty limited.

THE COURT: It is for everybody.

MR. STRASSER: Yes, sir, but when you take Mr. Dvorak, with his physical limitations, and put him into that facility with that limited range, it's going to mean that there's nothing he can do. It is not just a question of saying he could do the same things he could do at Ritz. He can't. Those things won't be available to him in the prison, so that would be essentially sentencing him to sit in a jail cell for whatever length of time the Court would impose.

THE COURT: All right.

MR. STRASSER: Thank you.

THE COURT: Well, addressing the objections made under Rule 32, as far as the amount of the loss is concerned in paragraph 23 of the report, I find that the calculation of the amount of that loss, as well as the restitution order in the amount of $1,039,929.10 is appropriate.

I find that that amount of loss as a result of the conspiracy was an amount, and the items lost which go to make up that amount, was reasonably foreseeable to this defendant on and after February 14th when his participation in the conspiracy began; and I think it's appropriate to hold him accountable and require his restitution of that amount.

He will, of course, be held jointly responsible with Burchell for that amount, but that is an appropriate amount. To the extent that there is any ex post facto problem involved, and I don't believe there is, the only difference is that following the amendment of the Victims Protection Act, or whatever it was, the act that made restitution mandatory, prior to that time the only inquiry the Court was to make was to whether the defendant's resources were such that he could make the payments, taking into account his own needs and the needs of those dependent upon him, he has the capability of making these payments at the rate that I will order, whether the restitution is mandatory or not.

Insofar as the other objections to the report, that is the offense conduct in paragraphs 4 through 7, 10 through 13, 15, 17, 18, and 20, I find that the findings and statements in the presentence report are correct. Obviously, as counsel for the defendant points out, it's the Government's version of the things, but the jury accepted the Government's version of the things, as do I. And those statements are correct.

The obstruction of justice enhancement in my opinion is warranted, because I find that the defendant's statement that he was not only unaware of the deviousness and culpability of Burchell, but indeed he thought, to the contrary, that these were perfectly legitimate purchases for the DEA is both false and material.

This is not just the defendant against the word of Burchell. This was false testimony, and it was the testimony which centered around the real issue in the case. There wasn't any question there had been embezzlement. The only real question as far as this defendant was concerned is whether he knew of it and participated in it, and in my opinion his statement that he did not know it was false and was material in that it was the basis upon which the jury, or could have been the basis upon which the jury acquitted him. So that enhancement is justified.

As far as downward departure is concerned, while there is no legal prohibition against the Court granting such a downward departure, I do not think that it is justified under these circumstances. Guideline 5(h)1.4 entitles the defendant or permits the Court to make a downward departure where there's an extraordinary physical impairment.

There is a physical impairment. The defendant is limited, but his medical condition is not such that it cannot be handled adequately by the Bureau of Prisons, making him have accessible to him whenever needed, and indeed at all times if needed, the ambulatory oxygen cannister.

He may be vulnerable in prison, but that vulnerability is no different from any other slight, elderly person that is there. So the motion for a downward departure is denied.

I find, therefore, that for guideline purposes, the base level for this offense is six, increased by 11 because of the amount involved, that is, more than $800,000, indeed $1,039,929.10, increased by two for the obstruction of justice, increased by two for more than minimal planning results in an adjusted level of 21.

With a criminal-history category of Roman numeral I, this results in a range of 37 to 46 months, or 36 to 46 months, a two- to three-year term of supervised release, and a fine of between $7500 and $75,000.

With that background, Mr. Strasser, I'll hear any further statement you want to make on the defendant's behalf or any other information you want to bring to the attention of the Court.

MR. STRASSER: Your Honor, I would ask you to sentence him at the bottom of the range. Mr. Burchell is serving a sentence only of 40 months, and he was the mastermind of this scheme and the person who brought in a much wider variety of people, and caused the --

THE COURT: (Interposing) Did he get a Rule 35 reduction in his sentence.

MR. STRASSER: Yes. He began with a sentence of 48, then it was reduced to 40.

THE COURT: All right.

MR. STRASSER: As to the fine, I don't think Mr. Dvorak has the resources to pay any sort of fine. I would ask the Court to be mindful of the limitation on his resources in establishing a repayment schedule. His resources are limited, as shown by the presentence report.

Other than that, I don't think I -- well, I would ask again the Court to release Mr. Dvorak first of all pending an appeal. I understand it is not the Court's practice to do that. I would ask.

THE COURT: It's not my practice to allow voluntary surrender, but I don't have any particular practice -- maybe the Bar thinks I do, and they may have a better read on

it -- but I don't have any preconceptions about stay pending appeal. I will address that after I impose sentence.

MR. STRASSER: Very well.

THE COURT: Will the defendant come forward.

Mr. Dvorak, is there any statement you want to make on your own behalf, sir?

THE DEFENDANT: Well, Your Honor, I'm very very sorry that I was in any way connected to these crimes. And contrary to your belief, sir, I was tricked and fooled by Robert Burchell into believing that the items purchased were for the DEA.

I did not knowingly and willfully conspire with this man to defraud the U.S. Government. The people who know me know that I would never do anything like that.

There are other things to say here, but, Your Honor, I realize that the jury has found me guilty, and I must accept the consequences.

I profoundly regret that the embezzlement scheme was not obvious to me at the time it was being carried out, and I'm sorry; and I hope you will show me some compassion.

THE COURT: All right, sir. Anything further you want to say to the Court?

THE DEFENDANT: No, Your Honor.

THE COURT: Any reason why the Court should not now impose its sentence?

THE DEFENDANT: No, Your Honor.

THE COURT: Any statement the United States Attorney wants to make?

MR. LEARNED: None, Your Honor.

THE COURT: Well, it will be the sentence of the Court that the defendant be committed to the custody of the Attorney General or her authorized representative for imprisonment for a term of 37 months on each of the counts 1 through 19, those sentences to run concurrently.

There will be a three-year term of supervised release on each count, also to run concurrently. There will be restitution ordered in the amount of $1,039,929.10, owed jointly with his co-defendants, payable at the rate of $300 per month, beginning 60 days after his release.

I find that his resources are such that taking into account his own needs and the needs of those dependent upon him, he is well capable of making that.

I will impose as conditions of the supervised release that he pay the restitution, and I will waive the substance abuse testing and treatment general requirement of all supervised-release defendants.

Because the defendant did not plead guilty, he is advised he has the right to appeal. If he's unable to pay the cost of an appeal, an attorney will be appointed for him for that purpose. If he desires to take an appeal, notice of that fact must be given the clerk within ten days.

We now have the issue of whether the execution of the sentence ought to be suspended pending appeal, and I take it there will be an appeal.

MR. STRASSER: Yes.

THE COURT: Mr. Learned, you oppose release on bond pending appeal. Do you really think this defendant is going anywhere?

MR. LEARNED: No, but I mean I know how long appeals last, Your Honor, and I also know that, if I might add, the restitution order that the Court has fashioned that he doesn't have to pay anything until 60 days after his release, I wonder if the Court could modify that. He has stock in a company that's worth $150,000 by his own account.

THE COURT: Well, I will consider whether, when that 60 days begins to run, depending on whether he is out on bond pending appeal or whatever. If he's incarcerated, I'm not going to require it.

MR. LEARNED: Your Honor, the problem I have, obviously, if there were a substantial question here, but I mean it's the perception of the public that's at stake here. I mean this man is well known in this community. I realize there wasn't much press on this case, but among people who sell audiovisual equipment who do business with the Government, this case is well known. This is a big case. A lot of people know about this.

A man gets convicted, and then, you know, he is still there in the community. I mean, months go by, and, you

know, didn't I hear, I thought this guy was convicted months ago. What's going on?

The perception of someone who's been convicted and then hasn't gone to jail, hasn't been sentenced for months on end, I think it just is very detrimental to the public perception of justice.

I know how long these appeals take. I mean, you know, counsel, he is not going to push it along very fast, and the Court of Appeals has got a lot of things. I mean, it's sometimes a year, more than a year, I have had cases of that sort. And it just, obviously, if there were a matter here, a close legal issue where there might be case law going different ways, but I mean everything is clear in this circumstance.

I pointed out that good-faith instruction, even if he wins on that point, he is not contesting the conspiracy count, so let's assume he wins that count, or wins that argument in the Court of Appeals, he still comes back. He's convicted of conspiracy. The conspiracy covers the whole time frame. He's still stuck with everything the court has sentenced.

The only other thing, I mean, we have got a plain error problem with a prosecutor who misstated some evidence. It was such an isolated, harmless thing. I mean, it's really a completely harmless error. So, I don't see any issue there.

I do feel that there's a significant perception. I mean, people, poor people all the time get convicted, and they are sent out, and in this particular courtroom, boom, they go right away. And the perception is, you know, you got a lawyer, you are wealthy, you can do these things, and somehow, when do you go to jail? Well, months go by. So I think it really is detrimental to the perception, the public perception of justice in this Eastern District for that to happen.

THE COURT: We will deal with the perception, and if we are criticized for it, so be it, but I'm convinced the

defendant is not at risk of flight nor will he be a danger to the community.

I neglected in my sentence to impose a special assessment of $100 on each count, which will be part of the sentence, for $1900.

I do, however, revise the timetable for the beginning of the payments and let the $300 per month begin 30 days from today instead of 60 days from his release from confinement.

He is continued on bond pending appeal, and he shall continue to abide by the pretrial release requirements if there are any.

Mr. Strasser, is he under supervision of pretrial services?

MR. STRASSER: No, Your Honor. I think he's on his own recognizance in this case.

THE COURT: I don't have any problem with the continuation of the bond. He shall, however, remain on bond to abide the judgment of the Fourth Circuit.

If the Fourth Circuit affirms the convictions and sentences, then he shall within 48 hours report to the Bureau of Prisons for designation. Now if there is any problem with that, there will be plenty of time to work that out between now and then.

He is continued on bond.

MR. STRASSER: Thank you, Your Honor.

THE COURT: And we will deal with the perception the best way we can, Mr. Learned, your office and mine.

Court will stand adjourned.

(Whereupon, at 10:36 o'clock a.m., the above-captioned proceedings were concluded, and court stood adjourned.)

CERTIFICATE OF OFFICIAL REPORTER

COMMONWEALTH OF VIRGINIA)
) ss.
CITY OF ALEXANDRIA)

I, EDWARD DONOVAN McCOY, Registered Professional Reporter and Official Court Reporter for the United States District Court for the Eastern District of Virginia, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that I was authorized to report, and did so report in Stenotype, the foregoing proceedings;

THEREAFTER, my Stenotype notes were reduced to typewriting under my supervision; and I further certify that the pages herein numbered contain a true and correct transcription of my Stenotype notes taken herein.

DONE and signed, this _____day of _____, 19__, in the City of Alexandria, Commonwealth of Virginia.

COPY

_____
EDWARD DONOVAN McCOY, RPR
Official Court Reporter

* * *

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 U.S.C. § 1621. Perjury generally

Whoever -

(1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or

(2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true; is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

(June 25, 1948, ch. 645, 62 Stat. 773; Pub.L. 88-619, Sec. 1, Oct. 3, 1964, 78 Stat. 995; Pub.L. 94-550, Sec. 2, Oct. 18, 1976, 90 Stat. 2534; Pub.L. 103-322, title XXXIII, Sec. 330016(1)(I), Sept. 13, 1994, 108 Stat. 2147.)

18 U.S.C. § 3552. Presentence reports

(a) Presentence Investigation and Report by Probation Officer. - A United States probation officer shall make a presentence investigation of a defendant that is required pursuant to the provisions of Rule 32(c) of the Federal Rules of Criminal Procedure, and shall, before the imposition of sentence, report the results of the investigation to the court.

(b) Presentence Study and Report by Bureau of Prisons. - If the court, before or after its receipt of a report specified in subsection (a) or (c), desires more information than is otherwise available to it as a basis for determining the sentence to be imposed on a defendant found guilty of a misdemeanor or felony, it may order a study of the defendant. The study shall be conducted in the local community by qualified consultants unless the sentencing judge finds that there is a compelling reason for the study to be done by the Bureau of Prisons or there are no adequate professional resources available in the local community to perform the study. The period of the study shall be no more than sixty days. The order shall specify the additional information that the court needs before determining the sentence to be imposed. Such an order shall be treated for administrative purposes as a provisional sentence of imprisonment for the maximum term authorized by section 3581(b) for the offense committed. The study shall inquire into such matters as are specified by the court and any other matters that the Bureau of Prisons or the professional consultants believe are pertinent to the factors set forth in section 3553(a). The period of the study may, in the discretion of the court, be extended for an additional period of not more than sixty days. By the expiration of the period of the study, or by the expiration of any extension granted by the court, the United States marshal shall, if the defendant is in custody, return the defendant to the court for final sentencing. The Bureau of Prisons or the professional consultants shall provide the court with a written

report of the pertinent results of the study and make to the court whatever recommendations the Bureau or the consultants believe will be helpful to a proper resolution of the case. The report shall include recommendations of the Bureau or the consultants concerning the guidelines and policy statements, promulgated by the Sentencing Commission pursuant to 28 U.S.C. § 994(a), that they believe are applicable to the defendant's case. After receiving the report and the recommendations, the court shall proceed finally to sentence the defendant in accordance with the sentencing alternatives and procedures available under this chapter.

(c) Presentence Examination and Report by Psychiatric or Psychological Examiners. - If the court, before or after its receipt of a report specified in subsection (a) or (b) desires more information than is otherwise available to it as a basis for determining the mental condition of the defendant, the court may order the same psychiatric or psychological examination and report thereon as may be ordered under section 4244(b) of this title.

(d) Disclosure of Presentence Reports - The court shall assure that a report filed pursuant to this section is disclosed to the defendant, the counsel for the defendant, and the attorney for the Government at least ten days prior to the date set for sentencing, unless this minimum period is waived by the defendant. The court shall provide a copy of the presentence report to the attorney for the Government to use in collecting an assessment, criminal fine, forfeiture or restitution imposed.

(Added Pub.L. 98-473, title II, Sec. 212(a)(2), Oct. 12, 1984, 98 Stat. 1988; amended Pub.L. 99-646, Sec. 7(a), Nov. 10, 1986, 100 Stat. 3593; Pub.L. 101-647, title XXXVI, Sec. 3625, Nov. 29, 1990, 104 Stat. 4965.)

Federal Rules of Criminal Procedure, Rule 32 (Sentence and Judgment)

(a) In General; Time for Sentencing. When a presentence investigation and report are made under subdivision (b)(1), sentence should be imposed without unnecessary delay following completion of the process prescribed by subdivision (b)(6). The time limits prescribed in subdivision (b)(6) may be either shortened or lengthened for good cause.

(b) Presentence Investigation and Report.

(1) **When Made.** The probation officer must make a presentence investigation and submit a report to the court before the sentence is imposed, unless:

(A) the court finds that the information in the record enables it to exercise its sentencing authority meaningfully under 18 U.S.C. § 3553; and

(B) the court explains this finding on the record.

Notwithstanding the preceding sentence, a presentence investigation and report, or other report containing information sufficient for the court to enter an order of restitution, as the court may direct, shall be required in any case in which restitution is required to be ordered.

(2) **Presence of Counsel.** On request, the defendant's counsel is entitled to notice and a reasonable opportunity to attend any interview of the defendant by a probation officer in the course of a presentence investigation.

(3) **Nondisclosure.** The report must not be submitted to the court or its contents disclosed to anyone unless the defendant has consented in writing, has

pleaded guilty or nolo contendere, or has been found guilty.

(4) Contents of the Presentence Report. The presentence report must contain--

(A) information about the defendant's history and characteristics, including any prior criminal record, financial condition, and any circumstances that, because they affect the defendant's behavior, may be helpful in imposing sentence or in correctional treatment;

(B) the classification of the offense and of the defendant under the categories established by the Sentencing Commission under 28 U.S.C. § 994(a), as the probation officer believes to be applicable to the defendant's case; the kinds of sentence and the sentencing range suggested for such a category of offense committed by such a category of defendant as set forth in the guidelines issued by the Sentencing Commission under 28 U.S.C. § 994(a)(1); and the probation officer's explanation of any factors that may suggest a different sentence--within or without the applicable guideline--that would be more appropriate, given all the circumstances;

(C) a reference to any pertinent policy statement issued by the Sentencing Commission under 28 U.S.C. § 994(a)(2);

(D) verified information, stated in a nonargumentative style, containing an assessment of the financial, social, psychological, and medical impact on any individual against whom the offense has been committed;

(E) in appropriate cases, information about the nature and extent of nonprison programs and resources available for the defendant;

(F) in appropriate cases, information sufficient for the court to enter an order of restitution;

(G) any report and recommendation resulting from a study ordered by the court under 18 U.S.C. § 3552(b); and

(H) any other information required by the court.

(5) Exclusions. The presentence report must exclude:

(A) any diagnostic opinions that, if disclosed, might seriously disrupt a program of rehabilitation;

(B) sources of information obtained upon a promise of confidentiality; or

(C) any other information that, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons.

(6) Disclosure and Objections.

(A) Not less than 35 days before the sentencing hearing--unless the defendant waives this minimum period--the probation officer must furnish the presentence report to the defendant, the defendant's counsel, and the attorney for the Government. The court may, by local rule or in individual cases, direct that the probation officer not disclose the probation officer's recommendation, if any, on the sentence.

(B) Within 14 days after receiving the presentence report, the parties shall communicate in writing to the probation officer, and to each other, any objections to any material information, sentencing classifications, sentencing guideline ranges, and policy statements contained in or

omitted from the presentence report. After receiving objections, the probation officer may meet with the defendant, the defendant's counsel, and the attorney for the Government to discuss those objections. The probation officer may also conduct a further investigation and revise the presentence report as appropriate.

(C) Not later than 7 days before the sentencing hearing, the probation officer must submit the presentence report to the court, together with an addendum setting forth any unresolved objections, the grounds for those objections, and the probation officer's comments on the objections. At the same time, the probation officer must furnish the revisions of the presentence report and the addendum to the defendant, the defendant's counsel, and the attorney for the Government.

(D) Except for any unresolved objection under subdivision (b)(6)(B), the court may, at the hearing, accept the presentence report as its findings of fact. For good cause shown, the court may allow a new objection to be raised at any time before imposing sentence.

(c) Sentence.

(1) Sentencing Hearing. At the sentencing hearing, the court must afford counsel for the defendant and for the Government an opportunity to comment on the probation officer's determinations and on other matters relating to the appropriate sentence, and must rule on any unresolved objections to the presentence report. The court may, in its discretion, permit the parties to introduce testimony or other evidence on the objections. For each matter controverted, the court must make either a finding on the allegation or a determination that no finding is necessary because the controverted matter will not be taken into account in, or will not affect,

sentencing. A written record of these findings and determinations must be appended to any copy of the presentence report made available to the Bureau of Prisons.

(2) Production of Statements at Sentencing Hearing. Rule 26.2(a)-(d) and (f) applies at a sentencing hearing under this rule. If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the movant, the court may not consider the affidavit or testimony of the witness whose statement is withheld.

(3) Imposition of Sentence. Before imposing sentence, the court must:

(A) verify that the defendant and defendant's counsel have read and discussed the presentence report made available under subdivision (b)(6)(A). If the court has received information excluded from the presentence report under subdivision (b)(5) the court--in lieu of making that information available--must summarize it in writing, if the information will be relied on in determining sentence. The court must also give the defendant and the defendant's counsel a reasonable opportunity to comment on that information;

(B) afford defendant's counsel an opportunity to speak on behalf of the defendant;

(C) address the defendant personally and determine whether the defendant wishes to make a statement and to present any information in mitigation of the sentence;

(D) afford the attorney for the Government an opportunity equivalent to that of the defendant's counsel to speak to the court; and

(E) if sentence is to be imposed for a crime of violence or sexual abuse, address the victim personally if the victim is present at the sentencing

hearing and determine if the victim wishes to make a statement or present any information in relation to the sentence.

(4) In Camera Proceedings. The court's summary of information under subdivision (c)(3)(A) may be in camera. Upon joint motion by the defendant and by the attorney for the Government, the court may hear in camera the statements--made under subdivision (c)(3)(B), (C), (D), and (E)--by the defendant, the defendant's counsel, the victim, or the attorney for the Government.

(5) Notification of Right to Appeal. After imposing sentence in a case which has gone to trial on a plea of not guilty, the court must advise the defendant of the right to appeal. After imposing sentence in any case, the court must advise the defendant of any right to appeal the sentence, and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. If the defendant so requests, the clerk of the court must immediately prepare and file a notice of appeal on behalf of the defendant.

(d) Judgment.

(1) In General. A judgment of conviction must set forth the plea, the verdict or findings, the adjudication, and the sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment must be entered accordingly. The judgment must be signed by the judge and entered by the clerk.

(2) Criminal Forfeiture. If a verdict contains a finding that property is subject to a criminal forfeiture, or if a defendant enters a guilty plea subjecting property to such forfeiture, the court may enter a preliminary order of forfeiture after providing notice to the defendant and a reasonable opportunity to be heard on the timing and form of the order. The order of forfeiture shall authorize the Attorney General to seize the property subject to

forfeiture, to conduct any discovery that the court considers proper to help identify, locate, or dispose of the property, and to begin proceedings consistent with any statutory requirements pertaining to ancillary hearings and the rights of third parties. At sentencing, a final order of forfeiture shall be made part of the sentence and included in the judgment. The court may include in the final order such conditions as may be reasonably necessary to preserve the value of the property pending any appeal.

(e) Plea Withdrawal. If a motion to withdraw a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit the plea to be withdrawn if the defendant shows any fair and just reason. At any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255.

(f) Definitions. For purposes of this rule--

(1) "victim" means any individual against whom an offense has been committed for which a sentence is to be imposed, but the right of allocution under subdivision (c)(3)(E) may be exercised instead by--

> **(A)** a parent or legal guardian if the victim is below the age of eighteen years or incompetent; or
>
> **(B)** one or more family members or relatives designated by the court if the victim is deceased or incapacitated;

if such person or persons are present at the sentencing hearing, regardless of whether the victim is present; and

(2) "crime of violence or sexual abuse" means a crime that involved the use or attempted or threatened use of physical force against the person or property of another, or a crime under chapter 109A of title 18, United States Code.

§ 3C1.1. Obstructing or Impeding the Administration of Justice

If (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense, increase the offense level by 2 levels.

Commentary

Application Notes:

1. This adjustment applies if the defendant's obstructive conduct (A) occurred during the course of the investigation, prosecution, or sentencing of the defendant's instant offense of conviction, and (B) related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) an otherwise closely related case, such as that of a co-defendant.

2. This provision is not intended to punish a defendant for the exercise of a constitutional right. A defendant's denial of guilt (other than a denial of guilt under oath that constitutes perjury), refusal to admit guilt or provide information to a probation officer, or refusal to enter a plea of guilty is not a basis for application of this provision. In applying this provision in respect to alleged false testimony or statements by the defendant, the court should be cognizant that inaccurate testimony or statements sometimes may result from confusion, mistake, or faulty memory and, thus, not all inaccurate testimony or statements necessarily reflect a willful attempt to obstruct justice.

3. Obstructive conduct can vary widely in nature, degree of planning, and seriousness. Application Note 4 sets forth

examples of the types of conduct to which this adjustment is intended to apply. Application Note 5 sets forth examples of less serious forms of conduct to which this enhancement is not intended to apply, but that ordinarily can appropriately be sanctioned by the determination of the particular sentence within the otherwise applicable guideline range. Although the conduct to which this adjustment applies is not subject to precise definition, comparison of the examples set forth in Application Notes 4 and 5 should assist the court in determining whether application of this adjustment is warranted in a particular case.

4. The following is a non-exhaustive list of examples of the types of conduct to which this adjustment applies:

(a) threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so;

(b) committing, suborning, or attempting to suborn perjury;

(c) producing or attempting to produce a false, altered, or counterfeit document or record during an official investigation or judicial proceeding;

(d) destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an official investigation or judicial proceeding (e.g., shredding a document or destroying ledgers upon learning that an official investigation has commenced or is about to commence), or attempting to do so; however, if such conduct occurred contemporaneously with arrest (e.g., attempting to swallow or throw away a controlled substance), it shall not, standing alone, be sufficient to warrant an adjustment for obstruction unless it resulted in a material hindrance to the official investigation or prosecution of the instant offense or the sentencing of the offender;

(e) escaping or attempting to escape from custody before trial or sentencing; or willfully failing to appear, as ordered, for a judicial proceeding;

(f) providing materially false information to a judge or magistrate;

(g) providing a materially false statement to a law enforcement officer that significantly obstructed or impeded the official investigation or prosecution of the instant offense;

(h) providing materially false information to a probation officer in respect to a presentence or other investigation for the court;

(i) other conduct prohibited by obstruction of justice provisions under Title 18, United States Code (e.g., 18 U.S.C. §§ 1510, 1511).

This adjustment also applies to any other obstructive conduct in respect to the official investigation, prosecution, or sentencing of the instant offense where there is a separate count of conviction for such conduct.

5. Some types of conduct ordinarily do not warrant application of this adjustment but may warrant a greater sentence within the otherwise applicable guideline range or affect the determination of whether other guideline adjustments apply (e.g., §3E1.1 (Acceptance of Responsibility)). However, if the defendant is convicted of a separate count for such conduct, this adjustment will apply and increase the offense level for the underlying offense (i.e., the offense with respect to which the obstructive conduct occurred). See Application Note 8, below.

The following is a non-exhaustive list of examples of the types of conduct to which this application note applies:

(a) providing a false name or identification document at arrest, except where such conduct actually resulted in a significant hindrance to the investigation or prosecution of the instant offense;

(b) making false statements, not under oath, to law enforcement officers, unless Application Note 3(g) [sic] above applies;

(c) providing incomplete or misleading information, not amounting to a material falsehood, in respect to a presentence investigation;

(d) avoiding or fleeing from arrest (see, however, §3C1.2 (Reckless Endangerment During Flight));

(e) lying to a probation or pretrial services officer about defendant's drug use while on pre-trial release, although such conduct may be a factor in determining whether to reduce the defendant's sentence under §3E1.1 (Acceptance of Responsibility).

6. "Material" evidence, fact, statement, or information, as used in this section, means evidence, fact, statement, or information that, if believed, would tend to influence or affect the issue under determination.

7. If the defendant is convicted of an offense covered by §2J1.1 (Contempt), §2J1.2 (Obstruction of Justice), §2J1.3 (Perjury or Subornation of Perjury; Bribery of Witness), §2J1.5 (Failure to Appear by Material Witness), §2J1.6 (Failure to Appear by Defendant), §2J1.9 (Payment to Witness), §2X3.1 (Accessory After the Fact), or §2X4.1 (Misprision of Felony), this adjustment is not to be applied to the offense level for that offense except if a significant further obstruction occurred during the investigation, prosecution, or sentencing of the obstruction offense itself (e.g., if the defendant threatened a witness during the course of the prosecution for the obstruction offense).

8. If the defendant is convicted both of an obstruction offense (e.g., 18 U.S.C. § 3146 (Penalty for failure to appear); 18 U.S.C. § 1621 (Perjury generally)) and an underlying offense (the offense with respect to which the obstructive conduct occurred), the count for the obstruction offense will be grouped with the count for the underlying offense under subsection (c) of §3D1.2 (Groups of Closely Related Counts). The offense level for that group of closely related counts will be the offense level for the underlying offense increased by the

2-level adjustment specified by this section, or the offense level for the obstruction offense, whichever is greater.

9. Under this section, the defendant is accountable for his own conduct and for conduct that he aided or abetted, counseled, commanded, induced, procured, or willfully caused.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 251 and 252); November 1, 1990 (see Appendix C, amendment 347); November 1, 1991 (see Appendix C, amendment 415); November 1, 1992 (see Appendix C, amendment 457); November 1, 1993 (see Appendix C, amendment 496); November 1, 1997 (see Appendix C, amendment 566); November 1, 1998 (see Appendix C, amendments 579, 581, and 582).

§6A1.1. Presentence Report (Policy Statement)

A probation officer shall conduct a presentence investigation and report to the court before the imposition of sentence unless the court finds that there is information in the record sufficient to enable the meaningful exercise of sentencing authority pursuant to 18 U.S.C. § 3553, and the court explains this finding on the record. Rule 32(b)(1), Fed. R. Crim. P. The defendant may not waive preparation of the presentence report.

Commentary

A thorough presentence investigation is essential in determining the facts relevant to sentencing. In order to ensure that the sentencing judge will have information sufficient to determine the appropriate sentence, Congress deleted provisions of Rule 32(c), Fed. R. Crim. P., which previously permitted the defendant to waive the presentence report. Rule 32(b)(1) permits the judge to dispense with a presentence report, but only after explaining, on the record, why sufficient information is already available.

Historical Note: Effective November 1, 1987. Amended effective June 15, 1988 (see Appendix C, amendment 58); November 1, 1989 (see Appendix C, amendment 293); November 1, 1997 (see Appendix C, amendment 574).

§6A1.2. Disclosure of Presentence Report; Issues in Dispute (Policy Statement)

Courts should adopt procedures to provide for the timely disclosure of the presentence report; the narrowing and resolution, where feasible, of issues in dispute in advance of the sentencing hearing; and the identification for the court of issues remaining in dispute. Rule 32(b)(6), Fed. R. Crim. P.

Commentary

Application Note:

1. Under Rule 32, Fed. R. Crim. P., if the court intends to consider a sentence outside the applicable guideline range on a ground not identified as a ground for departure either in the presentence report or a pre-hearing submission, it shall provide reasonable notice that it is contemplating such ruling, specifically identifying the grounds for the departure. Burns v. United States, 501 U.S. 129, 135-39 (1991).

Background: In order to focus the issues prior to sentencing, the parties are required to respond in writing to the presentence report and to identify any issues in dispute. Rule 32(b)(6)(B), Fed. R. Crim. P.

Historical Note: Effective November 1, 1987. Amended effective June 15, 1988 (see Appendix C, amendment 59); November 1, 1991 (see Appendix C, amendment 425); November 1, 1997 (see Appendix C, amendment 574).

§6A1.3. Resolution of Disputed Factors (Policy Statement)

(a) When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor. In resolving any dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

(b) The court shall resolve disputed sentencing factors at a sentencing hearing in accordance with Rule 32(c)(1), Fed. R. Crim. P.

Commentary

In pre-guidelines practice, factors relevant to sentencing were often determined in an informal fashion. The informality was to some extent explained by the fact that particular offense and offender characteristics rarely had a highly specific or required sentencing consequence. This situation no longer exists under sentencing guidelines. The court's resolution of disputed sentencing factors usually has a measurable effect on the applicable punishment. More formality is therefore unavoidable if the sentencing process is to be accurate and fair.

Although lengthy sentencing hearings seldom should be necessary, disputes about sentencing factors must be resolved with care. When a dispute exists about any factor important to the sentencing determination, the court must ensure that the parties have an adequate opportunity to present relevant information. Written statements of counsel or affidavits of witnesses may be adequate under many circumstances. See, e.g., United States v. Ibanez, 924 F.2d 427 (2d Cir. 1991). An evidentiary hearing may sometimes be the only reliable way

to resolve disputed issues. See, e.g., United States v. Jimenez Martinez, 83 F.3d 488, 494-95 (1st Cir. 1996) (finding error in district court's denial of defendant's motion for evidentiary hearing given questionable reliability of affidavit on which the district court relied at sentencing); United States v. Roberts, 14 F.3d 502, 521 (10th Cir. 1993) (remanding because district court did not hold evidentiary hearing to address defendants' objections to drug quantity determination or make requisite findings of fact regarding drug quantity); see also, United States v. Fatico, 603 F.2d 1053, 1057 n.9 (2d Cir. 1979), cert. denied, 444 U.S. 1073 (1980). The sentencing court must determine the appropriate procedure in light of the nature of the dispute, its relevance to the sentencing determination, and applicable case law.

In determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial. See 18 U.S.C. § 3661; see also United States v. Watts, 117 S. Ct. 633, 635 (1997) (holding that lower evidentiary standard at sentencing permits sentencing court's consideration of acquitted conduct); Witte v. United States, 515 U.S. 389, 399-401 (1995) (noting that sentencing courts have traditionally considered wide range of information without the procedural protections of a criminal trial, including information concerning criminal conduct that may be the subject of a subsequent prosecution); Nichols v. United States, 511 U.S. 738, 747-48 (1994) (noting that district courts have traditionally considered defendant's prior criminal conduct even when the conduct did not result in a conviction). Any information may be considered, so long as it has sufficient indicia of reliability to support its probable accuracy. Watts, 117 S. Ct. at 637; Nichols, 511 U.S. at 748; United States v. Zuleta-Alvarez, 922 F.2d 33 (1st Cir. 1990), cert. denied, 500 U.S. 927 (1991); United States v. Beaulieu, 893 F.2d 1177 (10th Cir.), cert. denied, 497 U.S. 1038 (1990). Reliable hearsay evidence may be considered. United States v. Petty, 982 F.2d 1365 (9th Cir. 1993), cert. denied, 510 U.S. 1040 (1994); United States v. Sciarrino, 884 F.2d 95 (3d Cir.), cert. denied, 493 U.S. 997 (1989). Out-of-court declarations by an

unidentified informant may be considered where there is good cause for the non-disclosure of the informant's identity and there is sufficient corroboration by other means. United States v. Rogers, 1 F.3d 341 (5th Cir. 1993); see also United States v. Young, 981 F.2d 180 (5th Cir.), cert. denied, 508 U.S. 980 (1993); United States v. Fatico, 579 F.2d 707, 713 (2d Cir. 1978), cert. denied, 444 U.S. 1073 (1980). Unreliable allegations shall not be considered. United States v. Ortiz, 993 F.2d 204 (10th Cir. 1993).

The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 294); November 1, 1991 (see Appendix C, amendment 387); November 1, 1997 (see Appendix C, amendment 574); November 1, 1998 (see Appendix C, amendment 586).

Defendant's Requested Jury Instruction No. 37

The Good Faith Defense - To Charges of False Statements and Wire Fraud

The good faith of the Defendant Robert Dvorak is a complete defense to the charges of false statements in Counts 2-15 of the indictment, and the charges of wire fraud in counts 16-19 of the indictment. Good faith on the part of the defendant is simply inconsistent with a finding of knowingly and willfully making false, fictitious or fraudulent statements; and is inconsistent with the intent to defraud or to obtain money or property by means of false or fraudulent pretenses, representations or promises alleged in those charges.

A person who acts on a belief or an opinion honestly held is not punishable under either of these statutes merely because the belief or opinion turns out to be inaccurate, incorrect, or wrong. An honest mistake in judgement or an error in management does not arise to the level of knowledge and willfulness required by these statutes.

This law prohibiting false statements is intended to subject to criminal punishment only those people who knowingly and willfully attempt to deceive. Similarly, the wire fraud statute is written to subject to criminal punishment only those people who knowingly defraud or knowingly obtain money or property by means of false or fraudulent pretenses, representations, or promises.

While the term good faith has no precise definition, it means, among other things, a belief or opinion honestly held, an absence of malice or ill will, and an intention to comply with known legal duties.

With respect to the false claims charges, in determining whether or not the government has proven beyond a reasonable doubt that the defendant acted in good faith or acted knowingly and willfully in making false, fictitious or fraudulent statements, the jury must consider all of the

evidence in the case bearing on the defendant's state of mind. Similarly, with respect to the wire fraud charges, in determining whether or not the government has proven beyond a reasonable doubt that the defendant acted with an intent to defraud or to obtain money or property by means of false or fraudulent pretenses, representations, or promises or whether the defendant acted in good faith, the jury must consider all the evidence in the case bearing on the defendant's state of mind.

Keep in mind as you make your decisions that the Defendant, Bob Dvorak, does not have an obligation to prove that he acted in good faith because the defendant in a criminal case does not have an obligation to prove anything. It is the government's burden to prove to you, beyond a reasonable doubt, that the defendant Bob Dvorak acted knowingly and willfully to make false, fictitious or fraudulent statements. Similarly, it is the government's burden to show beyond a reasonable doubt that Bob Dvorak acted with the intent to defraud or to obtain money or property.

If you find that the defendant Bob Dvorak did not act with the specific intent to commit a crime, but instead acted in good faith, that is, in the good faith belief that he was doing nothing wrong, then that is a defense to both the false statement charges and the wire fraud charges in this case and you must acquit Bob Dvorak of these charges.

Authority: E. Devitt, C. Blackmar & K. O'Malley, Federal Jury Practice and Instructions § 27.16 (1992) (modified); Sand, Siffert, Loughlin & Reiss, Modern Federal Jury Instructions, Instruction § 8-1 (1992) (modified).

* * * * *

MR. STRASSER: Could I inquire of the Court, I think the Government has suggested, but I don't believe I have seen a draft of a willful blindness instruction?

THE COURT: I have got a willful blindness instruction. I have got a conspiracy instruction, an aiding and abetting instruction that I have been giving for years, but I think willful blindness is particularly appropriate in this case.

MR. STRASSER: That was the charge I was objecting to.

THE COURT: You have offered a good-faith instruction. It seems to me an appropriate instruction on willfulness and requirement of willfulness and knowingly is adequate for this.

MR. STRASSER: The Court will not give a separate good-faith instruction?

THE COURT: No. You get a pretty strong willfulness, although the Government suggested this bad purpose. I don't know if a bad purpose was part of willfulness, except maybe in a tax case. I'll give it, because the Government --

MR. STRASSER: They asked for it. We didn't object to that.

THE COURT: Pick it up and run with it.

MR. LEARNED: There's one concern I have.

* * * * *

* * * * *

a matter within the jurisdiction of the Drug Enforcement Administration, to knowingly and willfully make materially false, fraudulent, fictitious -- materially false, fictitious, and fraudulent statements.

Count one then goes to allege certain manner and means by which the conspiracy allegedly was carried out and lists a number of overt acts; that is, acts allegedly performed in furtherance of the conspiracy.

Count one is drawn pursuant to a provision of the United States Code that provides that if two or more persons conspire either to commit any offense against the United States or to defraud the United States or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each is guilty of an offense against the laws of the United States.

Certain terms will be used throughout these instructions, and I'll define them for you now. The term willfully is used. To act willfully is to act voluntarily and intentionally and with a specific intent to do something the law forbids; that is, with a bad purpose, to either disobey or disregard the law. To act knowingly is to act voluntarily and intentionally and not because of mistake or accident or other innocent reason.

Knowingly is used as an element in all of the offenses charged, and the Government may prove that a defendant acted knowingly by proving beyond a reasonable doubt that this defendant deliberately closed his eyes to what would otherwise have been obvious to him.

No one can avoid responsibility for a crime by deliberately ignoring what is obvious. A finding beyond a reasonable doubt of an intent of the defendant to avoid knowledge or enlightenment would permit the jury to infer knowledge.

Stated another way, a defendant's knowledge of a particular fact may be inferred from a deliberate or intentional

ignorance or deliberate or intentional blindness to the existence of that fact.

It is, of course, entirely up to you as to whether you find any deliberate ignorance or deliberate closing of the eyes, and the inferences to be drawn from any such evidence. And the fact that you may draw such an inference or knowledge does not relieve the Government of its burden to prove that the defendant acted knowingly by proof beyond a reasonable doubt.

You may not infer that a defendant had knowledge, however, merely from proof of mistake or negligence or carelessness.

A conspiracy such as the one charged in count one is a combination of two or more persons by concerted action.

* * * *

P-R-O-C-E-E-D-I-N-G-S

(10:15 a.m.)

THE COURT: My reason for convening court was I thought we were going to perhaps have to consider whether to use an alternate. We are missing a juror.

Mr. Jackson tells me that the missing juror has been spied apparently out the window approaching the courthouse. So, if that's really who it is, I'll recess until she gets here.

Do you know who it is?

COURT SECURITY OFFICER: Yes, Your Honor.

THE COURT: I assume the other jurors know who she is, too. We will recess until she gets here.

(Whereupon, at 10:15 a.m., court stood in brief recess and reconvened at 10:22 a.m.).

THE COURT: Mr. Learned?

MR. LEARNED: May it please the Court, counsel, ladies and gentlemen, this is the time when we lawyers can summarize the evidence, explain how it proves, or, in defense counsel's case, how it disproves the case; but what we lawyers say is not evidence.

Obviously, the evidence was on the witness stand or the documents you are going to see, and when lawyers try to describe what we recollect was the evidence, if your recollection is different from that, then disregard it, because

it's your recollection of the evidence, not mine or any other lawyer in this courtroom that counts.

Now, although there are a lot of documents in this case, a lot of money changed hands, we have four years worth of transactions, basically 78 specific transactions, it really comes down to a pretty simple case. It's pretty obvious crime was going on. DEA was defrauded very substantially. The only issue really is whether or not the defendant, Mr. Dvorak, knowingly participated in this crime.

Now, where do we start with the evidence? Mr. Burchell testified, and also Mr. Lunsford, that these transactions began, transaction number one, in about March of 1993. Burchell was already in the process of embezzling equipment at that time with his friend, Michael Hendrix.

He goes out there. He orders certain equipment. He deals with Mr. Lunsford for the first few times. The descriptions aren't all that -- there aren't that many misdescriptions. There are some in the beginning, but they don't stand out. Mr. Lunsford goes on vacation in the Summer of '93, and Mr. Burchell begins dealing with Mr. Dvorak.

The relationship forms, and Mr. Burchell explained in one of his earliest conversations with Mr. Dvorak was that, We couldn't buy these items unless the descriptions were vague.

Now, on cross-examination, when counsel asked Mr. Burchell about, Well, when did this conspiracy start, and Mr. Burchell was trying to explain it, Burchell actually said further in elaborating on that conversation, We are not supposed to get these items. He's saying that to Mr. Dvorak.

So Dvorak is probably wondering what's going on here. Descriptions have to be vague. But what happens? They start out with transaction No. 7. Mr. Dvorak was quoted by Mr. Burchell as saying, Well, it's okay if we can use our model numbers on these items.

So you start out with some model numbers, but the descriptions become pretty apparent. I'm not going to read them off to you. They are detailed very nicely in a summary sheet that Agent D'Antuono testified to yesterday where certain items are referred to, I mentioned in my opening statement. Certain technical jargon is used to deceive or conceal what it is that's being purchased.

The important thing to Mr. Burchell is that as these items progressed throughout '93, and they become quite substantial dollarwise, that this man never asked any questions, and so his confidence builds that he can trust Mr. Dvorak as more and more of these descriptions, the way, the terminology they use and so forth.

And so, finally, Mr. Burchell reaches a point where he thinks he can trust Mr. Dvorak enough to make a very unusual purchase, because up to this point in time, the purchases are mostly standard for an audiovisual store, those kinds of items.

But now he is going to bring up something entirely different. He wants to buy some laser disks, movies, $24,000 worth of movies. Now, this is a big step now. Why? I asked Mr. Burchell, why did you ask him? Were you concerned that he might say, Well, why does DEA want a lot of movies, and why am I supposed to - I'm not in the movies business. Why don't they go out to some video store and buy them? What do you want me for?

Mr. Burchell's answer was, I was confident. He told me several times, Whatever you want, we will get. So that confidence was there, and so what happens, he decides he has to give him the name of a supplier. He orders a bunch of laser disks and the process begins.

And, of course, the most important thing now is what are we have going to tell DEA? How is this going to be billed to the Drug Enforcement Administration?

They discuss the language he used, and the most important document in the case, ladies and gentlemen, is his document 18. These transactions are all put in 78 folders. The documents on the left are all the documents that come from the Drug Enforcement Administration. All the documents on the right are the documents that came from the defendant's own company.

These are the documents that the defendant himself gathered up. He was alone with these documents. He knew he was under suspicion. He gathered them and produced them.

They are revealing. But this was the real problem, because what they decided to do in the first transaction, they called $24,000 worth of laser disks, they called them, you know, a mounting kit, a tube adapter screen unit, generator, monitor units, support assembly. These were egregious misdescriptions of what it was.

Now, Burchell's explanation is, Hey, I'm committing a crime here, and this guy is helping me. What did the defendant say about this transaction? Well, he said, Look, I billed it as laser disks. on the right-hand side here is my invoice, and my copy of my invoice simply called it laser disks, and that is how I billed it to the DEA.

This document here that the Government has on the left-hand side, which refers to these all this technical jargon, I don't know how that came into existence. Imagine that. It's the mystery explanation. Burchell's explanation is I am committing a crime, and he is helping me.

The defendant's explanation is I don't know how this document exists. It has somehow been created or maybe he did some kind of funny white-out or something, but it didn't come from -- it didn't come from my company.

And yet, look at it. How could it be and why would Burchell need to phony up a document? Up to this point in time when Burchell wanted something, the defendant

admitted, I changed the invoice. If he said to put it this way, I changed the invoice, so why does Burchell need to phony up the document? The document speaks for itself.

There is no explanation by the defendant, and this is such a troubling document to him, because this is the document that seals the conspiracy. This is the point in time when Burchell knows for certain that this guy is in camp with me. We will have this mutual, profitable relationship. I'll get what I want. He's going to make money. There is no problem here. I can trust him. And so that's how this scheme, that's how this thing was sealed, was that document.

Now, the defendant's explanation, he has a problem with it, because if you look on the right-hand side of the documents, you will see that actually he produced three documents. And there is a written order form that he's produced to the FBI. It's got here, laser disks, his handwriting.

And down in the little corner here, defense counsel brought this out, it's a little handwritten note here which says, Copy of PO not received. You can see that there.

So, he doesn't want -- you know, making it look like there never was a purchase order, however, his own workup sheet does have a purchase order right on it, 9194189, so he must have had a purchase order because he's got a number to it, and his own invoice cites the same purchase order number. But his own documentation says there never was a purchase order.

Well, guess what? That purchase order number, if you look at the purchase order, again this technical jargon that came from Burchell, this purchase order, and again this is the Government's copy of the purchase order, is the very same number, 9194189. And that's what he has on his own internal invoice, so how did he get that purchase number on his document if he hadn't gotten the purchase order?

And you don't know about that little comment there written in handwriting, Copy of purchase order not received. Remember, he was gathering these documents. He was under suspicion. You don't really know when that little thing was written on there, because this is the troubling document, document 18.

You go back and you study this document. Again, there is no explanation from the defense of this document. This is a killer. This is the smoking gun.

The transactions continued all throughout '94. More equipment is purchased and misdescribed. There are all kinds of -- the $24,000, that was used up before too long. Burchell got an insatiable desire for movies and music. He had to get some more.

So, transaction 25, okay, transaction 25, they bill out some laser disks, and at this point in time they are a little more sophisticated about it. They get a bunch of laser disks, and they are just going to call them -- get this -- 12-inch, read-only memory disks. It's not going to be such a blatant misdescription. It's going to be a clever little technical jargon there.

See, the defendant already is thinking, you know is someday I may have to explain this stuff, so we have got to use wording here that is in the zone. So we use this language, 12-inch, read-only memory disks.

What do his own records show? It's a bunch of laser disks that he ordered. So they go on and they proceed, and then the transaction, again that transaction is worth $2400.

Transaction No. 26, this is a transaction for $9,000. Again, they need more money. Burchell's recollection is that every time I ordered, when he ran out of money, he would tell me, I need some more money. He would do another invoice. This one was called, simply billed 12-inch, read only. The Government says, that's the Government invoice, 12-inch,

read only. His internal invoice, 12-inch, read only, laser disks, one lot.

Okay, now counsel you know was talking about, well, maybe there's some white-out there or something. Maybe something is going on here. Why would Burchell need to white out anything? Whenever he wanted an invoice, the defendant produced it for him. He doesn't need to manipulate it. This man is willing to produce the paper for him. He doesn't need to manipulate any of these documents. That's the purpose of Mr. Dvorak. That's his job. Give me the invoice so I can do this, present it to the DEA.

And, of course, during this time period, they are back and forth communicating. What did Burchell remember about the fax machine? I told him, Don't fax anything unless I'm there at the fax machine, because they are communicating back and forth.

Burchell, as you will see in these documents, these notebooks, we have some bulk exhibits, Burchell has just an insatiable, compulsive desire to purchase every conceivable movie title that is available in the marketplace, certainly every pornographic one. And these faxes are going back, and he writes them out and lists them all. So he's standing by the fax machine.

So these transactions continue on, and finally, we get into '95. What happens? We get to the vehicle cover. Burchell, see his confidence is so much at this point, what does he do? He goes and says, I want to get a vehicle cover for my Chevy S-10 pickup.

So what does the defendant -- the defendant remembers the transaction. He directed him down the street in Beltsville to this particular company where it was done. But yet he said he didn't remember ever seeing it. He doesn't remember it.

Burchell says, Hey, when I came up there and had it on my Chevy S-10, he got out and looked at it and opened it and took a look at it.

Burchell says, Hey, I drove a series of cars, but I told him which cars were mine. Burchell is out there a couple of times a months, maybe three times a month. You are talking about 78 transactions over roughly four years. Figure it out, you know. A couple of times a month on average.

So anyway, he's out there. He's talking. He gets the vehicle cab. What's it billed? The Government is billed for just a cover. That's what it's called. It's nine hundred some dollars.

Then what happens next? Burchell is involved. He tells him he's going to Bracey. He's going to buy a retirement home. He tells them he's going down there. He going to -- he needs a generator, portable generator, needs a jet ski, all kinds of equipment, an all-terrain vehicle to drive around the woods.

Of course, the defendant denies these conversations. Well, I knew we were buying this stuff, but I didn't know -- he never told me. He didn't even tell me about Bracey.

The defendant says he didn't even know that this man had a vacation home. Now, of course, Burchell is commuting. On weekends he's down there for about a year or so. He testifies he's up here during the week, and this man he's working with doesn't know anything about his vacation home down in Bracey?

So the transactions continue on. We go beyond the trailers. Finally, in '95, also the topic of music comes up. Burchell, he remembered that. He said, I had never hinted to him or suggested music. He came to me and recommended I get music.

Now, the defendant said, Well, one of my people there suggested to me that I might suggest to Mr. Burchell that he ought to buy music, so I mentioned that to him.

Why is Mr. Dvorak recommending to the Drug Enforcement Administration that they buy a lot of music compact disks? Why is he recommending it? Of course, Mr. Burchell remembered certain items that he individually recommended: Lee Ann Rimes sang some country song that was just a classic, I understand, that apparently was written for Patsy Cline years ago, and Burchell remembered that conversation.

The defendant said, Well, you know, I didn't tell him that. He overheard that among employees, as though Burchell was, you know, in a room with other employees, and does that sound like Burchell? Although the defendant admitted he recommended some Sinatra collection, he recommended that, and that is because the vendor, who was selling all this stuff, recommended it.

Again, the defendant is recommending the Drug Enforcement Administration buy a Sinatra compact disk. So anyway, those transactions, now when they start billing those transactions, well, they call them CD rom, one lot or CD rom package. That's what they are called, although really they are both laser disks and compact music disks. They are all one package virtually. They are all thrown together. Whenever they are out of money, they just come together and come up with another invoice.

Eventually, we get into '96. We have got hardware. You know, we have got lawn mowers, and we get into cabinets, these Sorice glass-door cabinets. Burchell is collecting so many movies. Imagine the problem he's got. He is into at this point in time nearly a $100,000 worth of movies and music, so he gets, the very first crack he gets 16 of these top-of-the line cabinets that are especially designed with glass doors. When you look at the internal records of Ritz, you will see some nice brochures there that describe these things.

He tells him. He tells him what they are for. Of course, the defendant says, I didn't know what these were for. He never said that, you know. So the DEA is now buying, not

only did they buy all this equipment, music and stuff, they are also buying these nice cabinets, which are especially designed for laser disks with nice little spaces for the music and so forth.

So the transactions continue. All kinds of Sharp video projectors are purchased, and then in June or July 1996, a very important event happens. This is absolutely uncontested in the case. Even if you don't believe a word of Burchell, you have got to believe this.

What happens? Gary Lunsford, they are trying to sell a Sharp video projector to the McLean Bible Church. The deal doesn't go through. The other salesman goes out to visit, finds out about it, comes back and reports what happened.

Here's Lunsford there. Here's the defendant there. What does this guy Chris Williams say? They have already got a video projector at some price, and he quoted the price. The price was less than what the authorized dealer, Ritz, was able to pay for it.

So what does Lunsford do? He gets the serial number. He says, Let's go check. Remember, they are the authorized dealer. Somebody was invading their territory. He's the authorized dealer. He goes in and runs the serial number, and he says, I can't believe it. This is one we sold the DEA. That's uncontested.

The defendant took the stand. He didn't deny that that conversation took place, so you know for a fact that happened. Now, you see he can't -- he would love to be able to say his business partner is a liar, but he can't do that. He can't say that Lunsford is a liar, so you have just got to accept that fact. It happened.

So he knows now that Burchell is selling one of these video projectors. It's being sold at a price that is below what they could do.

What happens? Now Lunsford says, I didn't say anything. Did you try to confront him? No, we didn't.

Burchell says nobody said anything to him. You see, nobody says anything. Lunsford, he knows these transactions are profitable.

What do we know from Lunsford? The DEA was their second biggest customer over that four-year period. The only customer bigger than that was the Seventh-Day Adventists Church. Lunsford didn't want to necessarily rock the boat, and Dvorak, he was silent. He didn't speak up. He didn't say anything. That proves, you see, he really knew what was going on.

Had he been innocent, had he been just fooled by all these transactions, he would have said, Wait a minute. We had better call the FBI, or we had better go find out, why did this happen?

So anyway, the transactions continue, and there's a very significant transaction. A month after this McLean Bible Church incident, Burchell comes in and says to Dvorak, I want a boat for the lake down there. He explained how he lived on nice little lakefront property down in Bracey.

What happens? Dvorak says, I don't think I can do a boat, but I do know a guy, so he brings in this guy Tomlinson, who is next door, Global Sales. Now, what do we know about Global Sales?

Mr. Lunsford explained Global Sales is like a marketing agent for them. I mean, Global Sales gets on the phone and tries to get Government customers to buy the equipment.

All the paperwork is done by Ritz. Ritz invoices the sale. These guys just put the deal together. They are on the phone. They put the deal together, and when they put the deal together, they get a commission.

So money flows from Ritz, which makes the deal. They sell it, and they would pay a commission, 60-40, whatever, to these guys, Bob Tomlinson and his partner,

Chester Johnson. So that's what you know about Global Sales.

Well, he calls this guy Tomlinson in, and Dvorak, or, Burchell testifies how, you know, they talk about he needs a boat. Burchell gives him a description.

Tomlinson says, Well, I know somebody, and Tomlinson goes out and contacts, and the deal is set in motion. They have a second meeting. Again, all these -- these meetings are in Dvorak's office. At the second meeting, what happens?

The second meeting, they are sitting there, and that's when the topic comes up about what to pay, how much money is the DEA going to be charged and what to use?

Burchell describes it. The three of them are around like in Dvorak's office, and Burchell says, It's got to have something to do with computers. And they all suggest, Mr. Dvorak suggests some wording, and Mr. Tomlinson suggests. Finally, Tomlinson comes up with the word motherboards, and that's what they decided to do.

There are three invoices, Exhibits 101, 102, and 103. That's about $65,000 of motherboard, you know, ostensibly, motherboard sales to DEA, when in reality what was it? It was a boat.

Now, on the second or the third meeting, Burchell brought up the idea, I want some golf clubs for his sister. So the golf clubs come up, and again, what does Dvorak say to him?

He says, Well, you know, Tomlinson plays golf, so we'll get him involved. So Tomlinson comes in. Tomlinson, you know, goes out and buys golf clubs. That gets in the deal, too. There are ultimately three invoices, about $65,000 is paid for a boat and golf clubs. Now, Mr. Dvorak's explanation of this doesn't make any sense.

First of all, Dvorak says, Well, I brought them together. They were in my office. I was on the phone, like, I didn't really know what they were talking about.

Now, wait a minute. Mr. Burchell is in the middle of a fraudulent transaction, and he's going to have some guy go out and get a boat and have that guy bill it as motherboards? How does Burchell have the trust to deal with this guy Tomlinson? He's never dealt with him before. Clearly, he would want Dvorak in the picture.

And also golf clubs. What did Mr. Dvorak say about golf clubs? I didn't even know there was golf clubs involved. He didn't know anything about golf clubs.

Well, is Burchell going to go off on his own and deal with this guy Tomlinson? Again, he has got no trust. There hasn't been any relationship built up the way there was the defendant. He has no relationship with this guy.

He's going to say, I'll tell you what, I want you to go out and buy by some golf clubs, and I want you to bill it to the Government as motherboards?

This guy is going to say, Wait a minute. I'm going to ask some questions. I'm going to make a phone call here.

So, it's clear this transaction would never have occurred with Burchell and Tomlinson unless he had Dvorak in the middle to protect him. Dvorak -- he relied on Dvorak. And, obviously, Tomlinson, he doesn't know Burchell. So it's Dvorak that links the two. Yet Dvorak says, Well, they were in my office, and I was on the phone, but I didn't really know. I didn't know anything about motherboards.

What I did was, since Mr. Tomlinson didn't invoice, I created a template off my Excel spread sheet and gave it to him. And I didn't know anything about motherboards.

Wait a minute. You mean, you are telling me that Mr. Burchell is so reckless that he would deal with a guy that

he never dealt with before and tell him, Now, you buy a boat. I want you to sell a boat to the DEA and I want you to call it motherboards. It's inconceivable that Burchell would do such a thing.

And Lunsford, he admitting knowing more about the transaction than the defendant. Lunsford knew it was billed as motherboards. Lunsford saw a purchase order. He said Tomlinson showed me a purchase order, and I knew there was a boat being bought, and I knew that it was being billed as motherboards. And that's why Lunsford lied.

When the FBI came around and interviewed, Lunsford admitted that he lied about that transaction, because both he and Dvorak got $5600 each.

Now, Mr. Dvorak, he didn't want to admit to the $5600, you know, like it's a commission, like I somehow, like it's not money I made in the deal, or I didn't get anything out of this, like I was paid in Russian rubles or something, you know, like I didn't get -- well, it's a commission.

Let me tell you, Mr. Lunsford explained this wasn't just the standard commission. The standard commission is they pay, they pay Global. The money doesn't flow the other way, and this is the only time Lunsford ever knew of a situation where he was getting money, and they are getting personal money. This is a check personally to them.

The money is not run through the company, through David Ritz, 20-percent owner of the company. The money is not going through that. They helped arrange this deal, and they get $5600 each. The defendant somehow couldn't admit the fact that he made some money in this deal.

So anyway, that transaction, these things continue on. We get into just a litany of purchases being made. Vacuum cleaners. I mean, you know, Burchell testified he was in his office looking at a catalog, and, you know, a microwave oven, a microwave oven got billed as a microwave switch. All these things were going on, more movies, more

music. And what's interesting is the number of Sharp video projectors, and you will see this when you look at the chart.

After they hear, both of them, Lunsford and Dvorak, hear about that McLean Bible Church situation, right afterwards, there was about another forty or fifty, or about forty, I think, video projectors being sold. They know full well what's going on.

So anyway, they finally, they continue to bill, and these cable descramblers, remember that story? Burchell said that he wanted to get some cable descramblers.

Well, Dvorak didn't want to actually buy them. He was concerned they might be illegal. So what he did was, he said, I'll tell you what. You bill me for the sale, and I'll get money orders, and then the dealer will just deliver them to your office; and you take these money orders because they will be COD, and you pay for them.

So it's as though the Government needs to have Mr. Dvorak to be in the middle of this deal and has to go out and get money orders so that these cable descramblers can be purchased. It just makes no sense at all.

So anyway, we get to the point in '97 where Burchell is becoming increasingly aggressive in what he's doing, and, you know, he gets a hot tub, you remember.

And, of course, I asked Mr. Burchell, Why would you ask for a hot tub? I mean, were you fearful or concerned?

He says again, I trusted Mr. Dvorak. We had been doing this. I trusted him. He had told me a number of occasions, whatever you want, I'll get for you. And see this trust, you see in a conspiracy trust is important because you are really exposing yourself.

The other person can blow the whistle on you, so that relationship has to build. That's why it's inconceivable that Burchell would go off on his own with Tomlinson and

get a boat and golf clubs and call them motherboards, and yet, that's the defendant's version.

Does that make sense? That explanation is as ludicrous as what I call the mystery explanation for Exhibit 18, the famous first laser disk transaction, you know, the invoice that came out of nowhere. Again, that invoice was explained.

By the way, getting back to that exhibit, Mr. Lunsford explained that you could manually go in the system and change the invoice number. It was possible to create that invoice. Of course, you know, there is no explanation as to why it exists from the defendant.

In any event, but in '97, it's important because Dvorak begins to sense that the nature of these purchases, Burchell is going to get caught one of these days. So he happens to stick his head in the door in June or July of '97, and the transactions are still going on. And he tells Mr. Lunsford, his business partner, you know, One of these days the FBI is going to come around and ask questions.

Now, again Mr. Dvorak, he can't call his business partner a liar. He can call -- every time he has got an uncomfortable conversation, he says, Well, Burchell is lying. Burchell is lying. But his business partner, so what can he do with that? He can't say Mr. Lunsford, my business partner, lied about that statement about the FBI.

So what he does is he puts a spin on it, and he says, Well, it was out of context. What I was telling him was I was concerned about, you know, all this litigation companies have about workmen's compensation and, you know, who knows, one day the FBI is going to come in and shut you down, like you have got some disgruntled employee, and workmen's compensation and litigation costs.

That explanation, ladies and gentlemen, you know, everybody knows the FBI doesn't go around and knock on your door because you have got a workmen's comp problem.

Now, whatever you have to think about Burchell, and you have got to weigh Burchell's testimony carefully. Burchell is a thief. He defrauded his own agency. He worked for 25 years, defrauded it, $2 million. You have got to weigh carefully what he says.

But I will tell you, ladies and gentlemen, Burchell never told you anything that insulted your intelligence. He never told you anything stupid. And yet, that statement about the FBI coming around because of a workmen's comp problem fear, that is outrageously stupid. That's the sign of a desperate man.

Burchell, all he had to do was tell the truth. The defendant, he's desperate, and there is no better sign of that than that absolutely ridiculous -- and again, see he couldn't call his businss partner a liar, so he had to admit that the conversation occurred.

So again what happens? Finally, you know, the deal, and Burchell testifies in late October. The FBI comes up. Everything collapses, and there is that little period there where, several weeks, where they are trying contact Burchell. He's not contacting them, and they are trying to contact him. The movies are building up and merchandise. There has been no contact.

Lunsford says, you know, in the middle of this period, he says, Well, Dvorak told me again, you know, The FBI is going to come round, I think. They are going to come around and talk to us.

Yet, what happens? When the FBI shows up December 1st, what does he say to the FBI? He says, Well, there was wasn't anything suspicious; there wasn't anything suspicion in dealing with Mr. Burchell.

Lunsford, he lies, because at least he knows about the boat deal, and so, you know, he's troubled enough about the deal. Of course, he knew all about the fact that McLean Bible Church got this video projector.

Of course, Lunsford doesn't see a lot of these invoices that go out. He only sees the retained copy. Very often, that is the sanitized copy. You see, that's the copy they keep in their records. Nobody told him what was it we really sold, you see.

So Lunsford doesn't see all this stuff, but he -- you know, he lies. But the defendant, he says, Oh, there's nothing suspicious here, even though he told Lunsford on two previous occasions, you know, This deal, the FBI is going to come in and ask questions.

Now, why -- here is the key question, ladies and gentlemen, I would like you to keep asking yourself throughout this as you deliberate. Ask yourself why Burchell was willing to risk exposure by ordering such outrageous things as, you know, golf clubs, and snowblowers, and massage chairs, and all this stuff?

Why was he? Because, you know, if he feared exposure from Mr. Dvorak, if he was in a situation where he thought he was fooling Mr. Dvorak, do you know what he would do? He would just buy more Sharp video projectors, you know, get the money. He was selling them at a pretty good price. After all, it didn't cost him a dime for them. Sell them and then go out and buy a hot tub with the cash, you see.

If he felt that this guy here, you know, I'm fooling him, Mr. Dvorak, I'm fooling him. He thinks these are -- so why would he be so -- why would he order these kinds of things from him? He could just buy more video projectors from him and take the money and then go out and buy vacuum cleaners and snowblowers and jet skis. But he didn't buy them. You know, it was a pain in the neck to sell these things.

He just says, Hey, man, I trust this guy. He knows what I'm doing. So what does he do? He just says, You go out and get it. I want to buy a hot tub. Bill it to DEA as a whatever, all right.

So, that tells you so much that there was a mutual understanding. A conspiracy is not necessarily an explicit agreement. It's a mutual understanding, a coming together of two people with a mutual objective, profitable to both with an illegal purpose understood.

Now, it's not necessary that the defendant understand every aspect of what Burchell is doing, as long as he understands the underlying, illegal purpose.

Now, you have heard a little bit about pinball machines and sting operations, you know, undercover operations, and so forth. Sure, I mean we all know this. Everybody knows, anybody who reads newspapers knows that the DEA might be involved in some undercover deal.

It's conceivable the Drug Enforcement Administration might need to buy some pornographic movies. Who knows? But they don't have to be billed -- I mean, there is no reason -- I can tell you about this pinball machine. The defendant says he heard about some pinball machines out there that the DEA was putting cameras in.

Let me tell you, ladies and gentlemen, whoever sold the pinball machines to DEA, I'll bet you they didn't invoice them as, you know, hand-controlled, electronic, rotating devices, right? They probably called them pinball machines.

Now, you are going to hear a lot about, well, Burchell is a liar, you can't trust Burchell. It's true you have to weigh carefully, no doubt about it, you have got to carefully weigh what he said.

Now, a couple of things. Burchell admitted, and this was established, the first time he met with the FBI and started to confess what he was doing, he told them right up front about Mr. Dvorak and another vendor by the name of Robinson. That was established. He told them.

He held back, he admitted he held back on some of his DEA employees and his ex-wife, Jean Burchell. He was kind of reluctant to give them up. It wasn't until the

documents were put in front of him that he told the whole story, involving you know ten years, hundreds of transactions.

Now, counsel made this big point, Well, now when you told the FBI such and such, you didn't tell them about this conversation about some specific, that jet skis were being used. You didn't tell them that.

He was being interviewed on hundreds of transactions, all kinds of deals, on a particular deal he have might have mentioned to Dvorak. He was in the Grand Jury for one hour. He was on the witness stand here, focused exclusively on this case, for three hours. So the fact that he might, there's no -- when he was interviewed by the FBI, didn't say a particular thing, the obvious question is he wasn't asked, he wasn't asked about some of the things that he was asked on the witness stand.

This is a guy that had to be debriefed. I mean, you can imagine ten years' worth of fraud, involving Mr. Hendrix, his former wife, and he had knowledge of many other people. He pled guilty, he cooperated, and his sentence was reduced from 48 to 40 months as a result of that.

Now, let me just talk a little bit about the indictment. Again, he's charged with a conspiracy, the opening count of the indictment. His Honor is going to explain the law to you. He's charged with conspiracy to defraud the United States by using some deceptive device.

You know, fraud is anything deceptive. You know, it's kind of like, it's as old as falsehood. You can't define fraud. Fraud is as old as falsehood and as versatile as human ingenuity. You know it when you see it, all right. You saw plenty of it in this case. Also, conspiracy to commit false statements, and some of the counts of the indictment, counts two through fifteen identify specific false statements.

Now, counsel may argue that some of this stuff is not false. Like he may say, Well, wait a minute. Count eight here, movie laser disks, what's wrong with calling them CD

roms? I mean, they are -- or computer data device? I mean, it's like saying, you know, after all, you know, a refrigerator is an electronic storage box, isn't it? So, what's wrong -- is it false if I call a refrigerator a -- I realize we don't have anything about a refrigerator -- I'm just using that as an example -- the point being is that if you come up with some technical jargon that's not the normal, the normal nomenclature for that item, it's untrue.

You walk into Circuit City or some of these -- I want to buy a CD rom, one-lot package. They are going to look at you and say, What are you talking about? Okay? You have got to call things what they are. There clearly was intent to deceive. Burchell has explained that. And all these particular descriptions are indeed untrue, and they are intended to deceive, and they are material to the DEA. So there are -- counts two through fifteen are particular false statements.

Then this particular mother -- and one of those is that one big $47,000 motherboard invoice involving the boat. And even if Mr. Tomlinson, you know, even if he actually prepared it, and of course you know that's the defendant's version, but we know Burchell said he got those three invoices in Dvorak's office, all right, so, and it looks exactly like that pro forma invoice.

Of course, the defendant says, well, you know, I gave him a template, gave him a disk, and I didn't know it was on it, okay. But if the defendant causes Tomlinson to put a false statement on there knowing it's the product of the conspiracy, then he too is guilty of the false statement, because he causes it to happen, even though he may not have actually typed it in.

So now, also, he's charged with wire fraud, six counts -- the last four counts, 16 through 19, and there is no question that wire fraud occurred. Burchell was defrauding his own agency, and he was sending interstate wire communications in furtherance of that fraud.

His Honor will explain to you that in order to convict him for aiding and abetting wire fraud, you have got to show these wires were used in furtherance, and there is no question they were. They were telling what, telling Mr. Dvorak what movies to purchase, and so there was wire fraud.

The only issue is whether or not the defendant aided and abetted. Now aid and abet, that is a little different concept than conspiracy, although in the facts of this case, they really are indistinguishable. But it's a different legal concept, and His Honor will explain to you what it means to aid and abet.

Basically, a defendant aids and abets in a crime if he knowingly associates with the venture, understanding the basic illegal parts, and participates in it as in something he wishes to bring about, and he seeks by his own actions to make it succeed. That's what aid and abet is, and that is what happened in this case with the wire fraud.

Also, His Honor is going to explain to you knowingly -- and all these things have to be done knowingly. You have got to knowingly join a conspiracy. You have got to knowingly aid and abet. And His Honor is going to explain to you, as well that -- you know, actually in some of these instances there's actual knowledge. I mean, Burchell is telling him his particular use of some of these things.

Other things, there is no specific evidence of something like a particular digital camera and so forth. I mean, there is no particular evidence as to every item, but clearly, you know, His Honor is going to explain to you the concept of willful blindness.

Basically, you can conclude that a defendant had knowledge if there is proof that the defendant deliberately closed his eyes to what would otherwise been obvious to him, finding beyond a reasonable doubt of a conscious purpose to avoid enlightenment would result in an inference of knowledge.

Stated another way, a defendant's knowledge of a fact may be inferred from his willful blindness to the existence of that fact, and there is no better evidence of that than just from that McLean Bible Church, even if you have got doubts about Burchell's testimony.

Clearly, you know, he understood. He didn't want to know. It was his strategy. His strategy was going to be, I don't want to know. Don't tell me. It probably bothered him that Burchell told him as much as he did. He probably said, Burchell, I don't want to hear about your Bracey house.

You know, it probably really bothered him, because he figured my defense is going to be, I didn't really know what happened here, ladies and gentlemen, because he knew sooner or later what was going to happen, you know, the shoe was going to drop sooner or later. I don't want to know, Burchell. But he did know, you know.

So, in any event, you know, there are greedy people, there are greedy people out there, but there are some people who exploit the greed of others. He was going to just ride this along. The greedier that -- let him be greedy. I'll just ride this along. I'll create these invoices with certain technical jargon. And I can say, Hey, man, the Government insists on the words of the purchase order being on there. Sure. Sure, they do, you know.

So, he's going to say, I'm just going to -- and my markup, I'm going to make, you know, my usual 35, 40 percent, 20 percent markup. I'm not real greedy here. I can just ride this out. Well, of course, it's the second biggest customer they had, with $285,000 worth of gross profit over those four years. That includes both the movies and these items.

Now, everything you know, ladies and gentlemen, about life, you bring into the courtroom to decide a case. It's kind of like the collective wisdom of all of you. I mean, you know from your work place, you know from your family

experiences that it happens. Sometimes somebody is involved in some deceptive, dishonest act.

And, you know, you don't like to see it. You presume, you presume that people are honest, and you should. This man is presumed to be innocent. You have got to be convinced. But you know, you know from your life and your everyday experience that you do uncover evidence. It might be within your own family. If you are a parent, believe me, if you are a parent, it happens now and then. You don't want to distrust your kid. Now and then you realize hey, they are not being truthful, okay.

So, it's no different when you are a juror and you are called upon to decide a case. You use the everyday, common-sense experiences that you have that guide you throughout life, you know, to draw the proper conclusions that you would draw, that there is dishonesty here, that this man fully participated in this crime.

So, with that understanding then, I will conclude my remarks. I submit that when you go back in the jury room and discuss the case, recollect the evidence, and particularly when you get your hands on that evidence, and I really urge you to take the time to look at those documents, they are so revealing, that when you have that opportunity and deliberate together, you will conclude that the defendant is guilty on each count of the indictment. Thank you.

THE COURT: Mr. Strasser.

MR. STRASSER: Good morning. This is a case where the Government asks you to convict Bob Dvorak based on the word of a felon, a thief, a habitual liar, a man who created some brand-new testimony for the occasion of this trial. That, plus a couple of little squiggles in documents. That's what the Government says amounts to a conspiracy to 15 false statements and to aiding and abetting wire fraud.

Now, the Government's position, I suggest to you, is a little, just a little bit better than some second-guessing of Mr. Dvorak, a little bit of second-guessing of the way he dealt with someone he believed to be a legitimate customer, making legitimate orders, with legitimate paperwork, and legitimate payment. That is what we have is second-guessing from the perspective of this courtroom, somebody saying, This is what you should have done, Mr. Dvorak, and because you didn't, because you didn't, you are guilty of a crime.

Now, there are some things, I guess, I can agree with Mr. Learned on. I will agree with him that Mr. Burchell had insatiable greed. It is hard to imagine how somebody absolutely needed to collect 3,000 laser disks or these cabinets or all the lawn mowers for that matter.

I agree with that, that Mr. Burchell shouldn't have done that. And I agree that Mr. Burchell and his DEA henchmen shouldn't have ripped off the DEA for $2.6 million. I'll bet Mr. Learned agrees with that.

But Mr. Burchell isn't on trial here. As you listened to Mr. Learned's closing argument, you got the feeling you were hearing closing argument about Burchell's fraud.

As you listened to Mr. Learned's closing argument, you heard some comments about what Mr. Lunsford thought. Well, what difference does that make either? None, because Mr. Lunsford's thoughts are not relevant here, and the thoughts of the other Ritz employees are not relevant here.

It is the thoughts of Mr. Dvorak that are relevant here, and he told you what his thoughts were. I thought this was the DEA. I thought I was helping them. Burchell came to me and said, I work for the DEA. We need your help. And Mr. Dvorak helped.

Now, at Ritz the company treated DEA like a regular customer, took orders over the phone, created the paperwork. You saw Mr. Dvorak's handwriting notes on the order form. They would wait for purchase orders. They would

order the merchandise. They would call up Burchell and say, This stuff is here. Come pick it up. Burchell would come out there and pick it up, and they would send an invoice in to DEA.

How does the invoice read? It matches the purchase order. Why does it match the purchase order? Because Burchell tells him it has to match the purchase order.

Now, when Burchell says that to Mr. Dvorak, Mr. Dvorak thinks to the other experience they had with other Government agencies, who all say the invoice has got to match the purchase order.

If you want to see other examples of that, you just look at Defense Exhibits 1 through 6, letters from other Government agencies that come in and say, We are not paying your invoice. There is a difference between it and the purchase order. That's what Carol Kendall testified about.

Now there was some cross-examination of her because these, and cross-examination of Mr. Dvorak, because these invoices all pertain to transactions in '98 and '99, but bear in mind that Ms. Kendall testified that, which she basically says we get this all the time. We have gotten these for years. This is typical of what we get from Government agencies. We get it all the time.

So when you think of what is in Mr. Dvorak's mind, you know that Ritz deals with, as he put it, more than 60 Government agencies, and the Government agencies say the invoice has to match the purchase order.

Burchell even says the invoice has to match the purchase order. But put aside all of those pieces of evidence and think about Ms. Jeter's testimony. She says she's going through the files, and she's looking to see if the invoice matches the purchase order. This is her job. So, I suggest to you this is not a disputed fact in this case.

So, when Burchell says to Bob Dvorak the invoice has got to match the purchase order, that's what Mr. Dvorak

does. And when Burchell says to Mr. Dvorak, I want you to keep it quiet that you are dealing with the DEA, the DEA doesn't want it known that it's dealing through you. Mr. Dvorak accepts that at face value. These are the instructions from his customer.

If you remember Mr. Dvorak's testimony on this point, when he got word about this picture phone that just became available, actually was suggested by Mr. Lunsford, who saw it said, Well, maybe the DEA would like to buy this. Mr. Dvorak calls up Burchell and says, Is it okay, if I -- are you interested in this?

Burchell says, Yes, I'm interested in it.

Okay. Is it okay if I tell the people who are selling it that it's DEA who is going to look at it? And Burchell says okay. There's a demonstration. It's at Ritz. Burchell goes there with Hendrix and looks at this picture phone. So Burchell is saying things to Mr. Dvorak to say, You are dealing with the DEA, but keep it quiet.

Now, why would the DEA want to do that? I don't that Mr. Dvorak has to know why they want to keep it quiet, but it's pretty obvious. I think Mr. Learned alluded to that in his closing argument. The DEA runs all manner of undercover operations. They run stings. They have things that they do, and they don't need to spread word around about what they are.

Mr. Learned asked Mr. Burchell during Mr. Burchell's examination whether he ever told anyone at Ritz, including Mr. Dvorak, that the DEA was running an undercover operation or that Burchell was involved in an undercover operation, and Burchell said no.

I suggest -- my reaction to that is no kidding, because what kind of undercover operation would it be if you go tell anyone who is supplying something to it, We are running an undercover operation? How do you run one unless you keep it secret?

So I suggest to you it's not surprising that Burchell doesn't come right out and say it, but when Dave Eltzroth goes down to DEA to do the systems design for the antenna installation, Burchell takes him into the workroom where the surveillance equipment is being put in the pinball machines.

Burchell tells that story very carefully. I brought him in there. I allowed him to see it, but I didn't bring him in there for that purpose. Okay. I guess that's what Mr. Burchell's present version is on that one.

Now, Mr. Learned made something in his argument of the suggestion that there was something wrong with the way Mr. Dvorak treated Burchell in suggesting other products to buy, and that one is just a puzzle to me. If you are in the business of selling things to your customers, and you suggest to a customer, would you like this or would you like that, that if there's something wrong with that, that that's anything outside of the ordinary course of commercial dealing, that there's something wrong with sales by saying to a customer, Would you like to buy something else, that's really hard to understand.

But that's why -- you heard the evidence about Mr. Eltzroth's suggestion on the music CDs. If this is some grand conspiracy between Mr. Dvorak and Mr. Burchell, how come this comes from Eltzroth? Eltzroth looks at these transactions and says, Maybe they would like CDs. It looks like a regular customer.

Now, let's think about how the DEA behaved towards Ritz. Send in all the paperwork. The purchase order comes in, and the goods are delivered. And then a check comes in in the ordinary course of business. It looks just like any other Government agency.

You heard Ms. Kendall's testimony that if a Government agency doesn't receive something that's ordered, it complains. It sends in a letter, and you can read those letters among the defense exhibits.

And did Ritz hear anything like that from DEA? Not a word. That was Ms. Kendall's job during this entire period. They heard not a word of complaint.

Burchell testified that copies of these purchase orders went to three different places in DEA. Could somebody have noticed this? Could somebody have mentioned it to Ritz? Maybe yes. Maybe no. Maybe there was such incompetence or corruption in DEA that they were unaware that Burchell was stealing. Maybe so.

But the issue is not how bad a job the DEA did. The issue is how did it look to Ritz? Or Ritz knows, or Mr. Dvorak knows -- let me be very specific -- Mr. Dvorak knows that if there is a problem with the Government agency, if it doesn't get what it has ordered, the agency complains; and then you look into it.

It didn't happen here, so the silence of DEA led Mr. Dvorak into believing that he was still dealing with a regular customer.

Now, Mr. Learned made some remarks about how important DEA was as a customer to Ritz, the second biggest customer. Well, you can add up all of these numbers. DEA did -- well, Agent D'Antuono's spread sheets said they did -- well, the two spread sheets together said Ritz did about a million-one in business. That was spread over four-and-a-half years.

During that four-and-a-half years, Ritz did somewhere around $25 million or $26 million in revenue, which means that the DEA business was about five percent of Ritz's business.

Mr. Learned talked to you -- well, I won't characterize how he talked to you -- he mentioned to you that there was some profit that Ritz made on these transactions. That's true. That's true.

Their markup over the cost of the goods was a standard markup. Just as Mr. Lunsford testified, their standard

markups run between 20 and 40 percent. The markups for DEA were around 33 or 35, according to Agent D'Antuono's calculations. That's the gross profit. That's just the difference between what it cost to buy their video projector and what they sold it for.

What it doesn't include is what it cost to rent the building and what it cost to pay employees, and to pay their benefits, and pay for the utilties, and to pay for all the other expenses of doing the business.

So, I suggest to you that that level of business with the DEA was not -- was worth something, for sure. I'm not suggesting to you that anyone at Ritz, and in particular, Mr. Dvorak, thought it wasn't worthwhile, but I'm also suggesting to you, it is a tiny fraction of that business, a tiny fraction of the business that Ritz did.

Now, let's talk about the other ways that DEA, as far as Ritz was concerned, behaved toward it. Regular purchase orders, regular checks. The equipment is picked up by somebody wearing Government credentials around his neck.

But let's look at some of the orders, some of the things that were ordered. There's this antenna installation in 1995 down at the DEA headquarters. Does this make sense to make that as part of a conspiracy? Why do that? Why ask -- by the Government's theory, these are coconspirators getting together to give something to the Government. What? Why do that?

I suggest an explanation to you. This is another effort to mislead Mr. Dvorak. It is Burchell's effort to mislead Mr. Dvorak about what the purpose of the other transactions are. It's to say these are legitimate. They look legitimate. Here is how legitimate it is. Come on down to the DEA headquarters and put in antennas for us. And then come back in two months and do it again. And then come back two years after that and do it again. There is Burchell leading Dvorak on.

Or how about this business about duplicating the training tapes? Now, here's something for a coconspirator to do. By the Government's theory, Mr. Dvorak and Mr. Burchell are in this scheme so that Burchell can enrich himself. How about making 2000 copies of some training tapes, which according to Burchell, are distributed to DEA agents around the world, does that make sense as being part of a conspiracy?

Now, there's also -- Mr. Learned conceded that the DEA does have undercover operations, and maybe they are putting video surveillance equipment in pinball machines, and he suggests that those pinball machines were billed in some particular way. Well, you don't have a shred of evidence before you on how those were billed. My suggestion to you on how they were billed to the DEA is they were billed in whatever way the purchase order described them. And who knows what that was?

Now, Mr. Learned also talked about -- I guess while we are talking about the things as to which there is no evidence, let's talk about Mr. Learned's discussion of document production in this case. Mr. Learned insinuated during his cross-examination of Mr. Dvorak and then came right in here and essentially argued to you that Mr. Dvorak must have altered some documents as part of the document production.

Now, nobody saw him do this. Nobody testified that he did it. Mr. Dvorak denied having done it. All the documents are produced, but the most remarkable thing, of course, is Mr. Lunsford was asked about these documents by Mr. Learned, and Mr. Lunsford said the copies you have are true, accurate, and exact copies of what we have in the Ritz files. So let us put this argument about document alteration by Mr. Dvorak, let us put that to rest.

Now, you know, there is another point about this. Mr. Learned says that all along, sometime early on in this conspiracy, Mr. Dvorak is thinking someday I'm going to

have to answer for this. Someday Burchell is going to get caught. Someday someone is going to come to me and say, What's your explanation?

And so, Mr. Learned says, Mr. Dvorak scratches some comments on a couple of these purchase orders. There are four or five. We showed them to you during the testimony of the witnesses, and I promise you I will not try and tax your patience again by showing you anymore documents during my argument than I absolutely must. So I won't put them up on the screen again. But you saw them.

Now, I ask you if Mr. Dvorak is thinking, I'm going to get, Burchell is going to get caught, Burchell is going to implicate me, I am going to be in trouble. His response to that is to write little notes on the purchase orders, on the invoices, on the order forms?

Why doesn't he do what Burchell does, and that is chuck them? Why doesn't he get rid of all those documents? This is one of the Government's big arguments, that Mr. Dvorak somehow knows he's going to be called to account and he's creating evidence that makes him look innocent. Why not just get rid of the documents? That's what Burchell said that Burchell did. He gets these quote forms -- whoosh -- out. Right? He is the one who is purging documents.

Mr. Dvorak is keeping hundreds and hundreds of pages -- Mr. Dvorak, excuse me -- Ritz is actually keeping them. Mr. Dvorak is not getting rid of them. Never mind all of that just on these 78 transactions. You look at those notebooks over there, Government's Exhibits 201 through 206.

I must say I cannot commend to you that you go and read every single page of those, but what you will find in there is page after page after page listing the titles of laser disks and music CDs that Burchell orders, and pages tracking the receipt of them from the distributor, and pages tracking the delivery of them to Burchell.

If Mr. Dvorak is thinking, man, I'm going to get caught someday, why keep those? Does that make a lick of sense? Why keep all these documents that Mr. Learned now says are incriminating?

Now, I think we might contrast Mr. Dvorak's conduct in keeping the documents and in leaving them unaltered, with the conduct of Mr. Burchell. And I put up on the screen for you some purchase orders that showed you the difference between the copy of the purchase order that's in the DEA files -- Exhibit 5 is an example of that and Exhibit 28, and there are eight others -- that shows one thing, and then the copy that's sent to Ritz has a part of that that's whited out.

You can go look at the exhibits and see that for yourself. I put a couple of them up on the screen. I obviously didn't go the other way, all right, because the copy in the Ritz files has got something missing, so it didn't start there. It started at the DEA.

Now, Mr. Learned says, Why does Burchell need to hide things from the DEA? Let me see if I can get this one. He's stealing? Maybe he's stealing from the DEA. Could that be why he's hiding things? Why he's altering paperwork? So that's one direction, all right. Purchase orders going to Ritz are altered from the DEA copies.

Look at the invoices coming back from Ritz. Those also are altered. The ones at Ritz, which Ritz preserves, show full descriptions, refer to Burchell, and when they come to DEA, you find they are altered.

Now why would he do that? Because it's going to reveal, Burchell is going to reveal what he's burying, so he's still figuring out how to hide what he is doing.

Now, there was one that I did show you, and I'm going to show you again, so you can line this up yourself. If you look at Government's Exhibit 26.1, and you just hold it, and you line it up with 26.2, the lineup, the 26.2, the Ritz

copy, 26.1 is the DEA copy, you will be able to see what was taken off the DEA copy. I'll put it up here.

You can see it says, the DEA copy, says 12-inch, read only, and underneath that, 12-inch, read only laser disks, one lot. You can see in the DEA copy there's a purchase order written in, and you can see on the Ritz copy, it says purchase order verbal. Oops, sorry.

You can see on the Ritz copy, it says Ritz AV pro forma invoice, and you can see that one is missing from the DEA version. So why is Burchell doing that? We will get to that in a minute when we talk about the laser disks.

But I suggest to you that there you have Mr. Burchell changing the documents in the DEA file and Mr. Dvorak preserving what he sent. What DEA ends up with is something that's vague, 12-inch, read only. What Ritz sent 12-inch, read only laser disks.

Before we get to the laser disks, let's talk about some of the other purchases. One of them that Mr. Learned talked about at great length is the purchase of the boat at Global Sales. Let's start out with the basics here on Global Sales. Mr. Learned got it backwards.

Ritz is not paying commissions to Global, right? So let's step back and look at the deal. The deal is Global gets office space. It gets administrative support. It gets heat, light, telephones, and fax machines, and the other kind of office support you need to run an office, from Ritz. And it doesn't pay anything for that. It doesn't pay rent. It doesn't pay for faxes. It doesn't pay for phones. It doesn't pay anything, except that when Global makes a sale, it has to pay 60 percent of the profit over to Ritz. That's the deal. The money is not going the other way. Let's start with that.

Now, on this boat transaction, Burchell asks Mr. Dvorak for a boat. Mr. Dvorak makes some effort to find it through Ritz Camera through their Boaters World subsidiary. They don't have it. He introduces Burchell to Tomlinson.

Now, Mr. Learned says to you, Why in the world would Tomlinson deal with Burchell without Mr. Dvorak there? I suggest to you, I guess, Tomlinson thought it was all right. I guess nothing about the transaction suggested something strange to Tomlinson.

Now, Tomlinson knew, because Mr. Dvorak told him, where Burchell worked. I don't think it's a long leap from knowing where Burchell worked to figuring out what that agency might use a boat for. Now, as part of that transaction, Mr. Dvorak told you he put together a template of an invoice for Global Sales, which didn't have its own, and he gave it to Tomlinson.

Tomlinson filled it out, and he didn't give copies to Mr. Dvorak. He didn't give him copies of the invoices sent to DEA. He didn't give him copies of the paperwork from the boat dealer. Nothing. Mr. Dvorak didn't see that until court.

Now, Mr. Lunsford said, Yes, Tomlinson sent me copies of that stuff, but he doesn't say when. Mr. Learned suggested that Mr. Lunsford saw that right away, but there isn't any evidence of that; and I suggest to you that Tomlinson probably sent those invoices much much later. But in any event, what Mr. Lunsford knew is not at issue in this case.

Now, there was some testimony from Mr. Dvorak about his receipt of the commission check. For sure, he got a commission check. You look at the check and see if it says, Boat for DEA on it because it won't. It's just a check to Mr. Dvorak.

Let me ask you to think about it this way. If Burchell had walked into Ritz and said, I need to buy a boat, and Dvorak had said, We don't do boats, and Burchell had walked out and bumped into Tomlinson in the parking lot and said, Man, I'm trying to buy a boat, and Tomlinson said, I know someplace where you can buy a boat. I got somebody who will sell you a boat, if the transaction happened that way, Mr. Dvorak would have gotten the identical commission,

because that's the deal with Global, a commission on every single transaction.

Now, we also heard some testimony about the trailers that Mr. Burchell bought trailers and that Mr. Dvorak must have known what was going into the trailers. Well, Mr. Dvorak is not the one loading this equipment into the trailers. There are other people at Ritz who are loading equipment onto the trailers.

Burchell says, Mr. Dvorak must have seen that car cover and the truck cover.

Mr. Dvorak says, I didn't see it.

Now, we had also some testimony about this hot tub or whirlpool or whatever it is. Bear in mind the testimony from Keith Brian, who owned Leisure Tubs. He said that, When I sold that whirlpool, I gave a blank invoice to Burchell. I didn't fill in the delivery place. I got the delivery address from Burchell, but I didn't fill it in. Burchell wanted it blank, and that's what he gave to him.

I expect the Government may come and argue to you, Well, go look at that Leisure Tubs invoice that's in the Ritz file. Doesn't that tell you something? Well, it does. It tells you, it shows you an address, a delivery address at DEA, not at Burchell's home.

The copy that's in the DEA, that Burchell provides, is the one, and the copy from the Leisure Tubs file is the one that shows the delivery to Burchell, but that's because Leisure Tubs needs to know where to bring the tub. No copy of that ever went to Ritz. You have the Ritz file on that in Government's 76. You look at it for yourself. There's nothing there about a delivery to Burchell at.

Now, a lot of what Mr. Learned told you rests on the testimony of Mr. Burchell, and I suggest to you that there are a lot of reasons to think that Mr. Burchell is not a believable witness, but let's use this laser disk transaction to illustrate that.

Now, let's talk through the transaction chronologically from the perspective of Mr. Dvorak, so we start with the order that he takes on 2-14-94 from Mr. Burchell.

Now, Mr. Learned asked you, How is it that Ritz gets a purchase order number, and the answer is Burchell gives it to him over the phone. 9194189 is the number. And then you see Mr. Dvorak's note on the bottom of this page, Copy of purchase order never received.

Now, when you look through the documents that Ritz has in this case, all of Exhibit 18.2, you are not going to find a purchase order in there, because Ritz didn't get one.

And after these laser disks are delivered, Ritz sends an invoice. That's this one: Laser disks, assorted titles, Invoice 52863. Now, how do you know that that is the invoice that goes with this transaction?

The answer to that is it's recorded in the Ritz accounting software, which is Exhibit 140, page 2, and you can see this number here, the invoice number, 52863. There's the date, there's the invoice, and there's the purchase order number.

Now, Mr. Learned says, Where did that come from? It comes from the order sheet, because that's what Burchell gave to him.

Now, the copy of the invoice is in the Ritz files, this one. The copy in the DEA files, as Mr. Learned showed you, says mounting kit, tube adapter, screen unit, a whole bunch of things like that. But I suggest to you that is an invoice that is created by Mr. Burchell.

Mr. Learned said the defense hasn't explained that invoice. Well, you know, we don't have to explain anything. It's not our burden to prove anything.

When Mr. Learned said to you in the beginning of his closing argument something about what I'm going to say

the evidence disproves, we don't have to prove or disprove anything. It's the Government's job to prove this case beyond a reasonable doubt.

But I'm going to go beyond what we are required to do, and I'm going to suggest to you a couple of reasons why you can tell that this invoice is made up. One is the invoice number, which belongs to a different transaction. It's much earlier. It's two years before.

And secondly, these items here, of course, have been sold to the DEA before. They are in Government's No. 7, an earlier transaction, but the part numbers are wrong, these miscellaneous parts, because when you look at Government's Exhibit No. 7, what you find is the parts numbers. That is how Ritz ordinarily generates those identical items, the mounting kits, and the tube adapter, and so on.

Now, Mr. Learned suggested in cross-examination that there were inventory implications by using these part numbers, and Mr. Dvorak answered him that there are inventory implications no matter what part number you use because this shows the sale.

So I suggest that Mr. Burchell took this invoice, No. 7, from July of '93, and created this phony one in February of '94, with a false invoice number, and the wrong part number, 182.

Now, Mr. Learned asked Mr. Dvorak, How is it that Mr. Burchell could possibly know that part 182 is a miscellaneous part number at Ritz?

And the answer is every single employee at Ritz knows that. It is something that Ritz has used since it was part of Ritz Camera, and Burchell dealt with a lot of Ritz employees who were loading things into his truck.

Now, apart from Mr. Burchell's efforts to alter documents and to get rid of documents that would have incriminated him, I think you have to look at what sort of

person he is, and I suggest to you he is a cold and bitter man now.

If you think about his life, he was for nine years on top of the world. He ran an office with a $30 million budget. When he wanted something, he called up one of his DEA henchmen and had them get it, or he got it himself; and the Government paid for it.

And he went from having that position for nine years to a position where the Government has taken his cars, his houses, his bank account, his Government pension, has taken back everything it could find that he bought with the Government's money and sent him to jail for almost four years.

Now, you saw him testify, and you will judge his character for yourself, but I suggest to you he is a bitter and angry man who feels that, since he is suffering, somebody else should suffer, too; and he's happy to see that person be Bob Dvorak.

Now, let me suggest to you some other reasons Mr. Burchell is not believable. One is he can't keep his story straight. He says Mr. Dvorak joined the conspiracy, but he can't say when, and he can't say what Mr. Dvorak did to join it.

He tells you -- you know, Mr. Learned said to you well, at least Burchell didn't tell you anything stupid. Try this one on. Mr. Burchell's account of the boat purchase is that he didn't care about the total price, he didn't care that the Government was paying $65,000. He was just annoyed about the markup. Does that make sense to you? I mean he knew about the total price in advance, but by his account, he was unhappy with the markup.

Now, does it make sense that he hired Ritz three times to install antennas at DEA during this supposed conspiracy, or that he used them to duplicate training tapes?

Does this make sense as something that conspirators were doing?

Look at the purchase orders that apply to the transactions that he did with Gary Lunsford. You find the same kind of strange descriptions and the invoices that match the purchase orders. But Burchell's account now is that Lunsford was not involved in this in any way. Well, why the changed descriptions then?

Now, on top of all those issues with Mr. Burchell, Mr. Burchell had a hope of -- I'll just leave it at that -- a hope maybe of different treatment in jail, a reduction of his sentence or perhaps different treatment in jail while he is serving his sentence.

The Government acknowledges that it asked for a reduction in Burchell's sentence, but Burchell acknowledged that in no way did that rest on Burchell's testimony against Mr. Dvorak; that was no part of it.

I suggest to you that the Government thought so little of Mr. Burchell's version of his story on that occasion, more than a year ago, that they didn't even ask the Judge to give Burchell credit for it.

Now, when Burchell was in front -- excuse me -- not when he was in front of the judge. When that motion was in front of the Judge, the Judge -- Burchell's lawyer said that Burchell is going to testify in two other cases, the Wisnefsky case and Dvorak's case.

The Judge said the Government can come back with a motion if it wants. Mr. Burchell acknowledged that he talked to his lawyer about that. And I suggest to you that this is what Mr. Burchell thought. I'll give this a shot. I might get something out of it. I might get something out of, and somebody else pays for it.

Now, is that a familiar refrain for Mr. Burchell, who had just done that for nine years at the DEA? He figures, I'll

take a shot. If Bob Dvorak pays for it, great. If nothing happens, so what? He didn't lose anything.

And so he, as he acknowledges, he waltzed into court with some new statements that he had told Mr. Dvorak about moving to Bracey, and he needed some of these items for Bracey. Never said that to anybody.

I know Mr. Learned asked questions of Burchell, and he suggested in argument that maybe they didn't pose the question right to Burchell, but boy, doesn't this seem like an awful important thing to have overlooked for two years?

I think when you look at the way that Burchell manipulated what he said about his own conspiracy, I think you will understand why he decides, I'm going to testify against somebody I don't care about, because when he gets caught, the first people he talks about are people with whom he has no relationship whatsoever: Bob Dvorak and another vendor. That's who he talks about.

The second person he talks about the next time is Gary Lunsford, and he says Lunsford knew about it and was in on it. Now, Burchell testified that isn't true, that's not what he said, although the FBI report of his interview said that he implicated Lunsford, that report is wrong, the FBI got that wrong, he didn't say that.

But I suggest to you that fits with this pattern of Mr. Burchell, that he decides he is going to try to pick on somebody he doesn't care about and doesn't really care what happens to them, and if he gets something out of it so much the better for him. And when that doesn't work, he very slowly decides to testify about some other people: Hendrix, who works for him, his ex-wife, and some buddies at DEA.

Now, I guess I -- well, let me emphasize again, you think of all the times that Burchell talked to the FBI and to Mr. Learned: November '97, December '97, January '98, February '98, June '98, and he testifies in the Grand Jury in November '98. All of those times, and he doesn't mention

anything about the supposed statements about going to Bracey?

Now, you have reason to reject those statements just from those omissions, just from the fact that Burchell never brought this up before. But you have very specific evidence that tells you it's false, and that's Mr. Dvorak's testimony.

Mr. Dvorak acknowledges that Burchell said, I'm going to retire, but Burchell didn't say where he was going to retire, didn't say anything about Bracey, and he certainly didn't say anything about using any of these items down in Bracey.

Now, when you think about Burchell, you think about somebody who lied and lied and lied for nine years. Every day he was lying. Every day he was telling a lie. I asked him that on cross examination. Isn't it true you were lying every day?

And what did Mr. Burchell say? He said yes, but only on this. Did you find that comforting?

Mr. Burchell is somebody who fooled a lot of people in DEA. He fooled people into signing purchase orders for him. He fooled an inventory control person into thinking the orders had been received. He fooled his supervisors, at least some of the time, into thinking that the goods he was ordering were useful for the DEA. And he fooled Mr. Dvorak into thinking that Ritz was selling things to the Federal Government.

What I ask you is don't let Mr. Burchell fool you also. Don't believe his testimony.

Now, let me mention one other whom he fooled. Defense Exhibit No. 8 is an internal audit report. There was an audit that DEA did of this very section of DEA in February of '96, a procurement audit, which reports that things are pretty good there. Contracting is pretty good. I think you understand what that means.

Now, the Government argues to you that Mr. -- well, the Government has really got two arguments here. One is that you should believe Mr. Burchell, but that's really pretty hard to swallow, this man who lied every day for nine years and came in and made up testimony and tells all manner of lies to the FBI and to Mr. Learned over the course of months and months and months, and holds things back from the Grand Jury, and I suggest to you lied in front of you in his denial that he had falsely implicated Gary Lunsford.

He admits that when he was talked to the first eight or nine times, he said nothing about Mr. Wisnefsky and then changed his testimony about him as well. So I suggest to you that Burchell is not worthy of any belief.

The Government argues to you, well, maybe you could take a little of what Burchell said, and you can look at some parts of the evidence, and you can get this willful blindness idea, that if Mr. Dvorak deliberately turned away so as not to know, then he's guilty.

Well, let's start with the basics here. There is no evidence of that. You didn't hear that from Mr. Dvorak. Mr. Dvorak didn't say, Oh, I thought something was wrong, but I didn't want to know.

I urge you, when you look at this, not to look at it now, not to look at it from the perspective of this courtroom, not to look at it after seeing two days of trial and hearing 20 witnesses and looking at 78 different sets of transactions, but ask yourself, how did this look to Mr. Dvorak at the time, and how it looked to him was that the DEA was making a series of purchases, some of them ordinary equipment, the kind of equipment where Ms. Jeter said, I wouldn't have questioned that -- computers, video cameras, video projectors -- all of those things, perfectly ordinary purchases, and a series that were not in the ordinary course.

Mr. Dvorak knew he couldn't ask Burchell about it. He knew that when Clausen had asked Burchell about it, Burchell said, It's not for you to know. Mr. Dvorak knew

from talking to his brother, who had worked at the CIA for many years, that law-enforcement agencies and these secret agencies make a wide variety of purchases for a wide variety of operations, and it was not for vendors to ask about them. They can't ask about them, because the agency can't tell.

And his brother suggested to him that, based on his brother's experience, that even things like these laser disks are used for particular purposes in the agencies, for hardship assignments, possibly as bribes, or possibly for undercover operations.

Now, Mr. Dvorak knew from Eltzroth's visit to the DEA that the DEA was installing surveillance equipment in ordinary -- well, not ordinary things, but in pinball machines, and he knew that Burchell said to him, DEA needs these things.

Now, I suppose Mr. Learned is going to suggest to you that it's the nature of the items that should have made Mr. Dvorak ask questions, jet skis and hot tubs and lawn mowers and things like that.

But you heard Mr. Lunsford's testimony that if someone from the Seventh-Day Adventists Church had called him up and said, I want to buy a jet ski, I want to buy a hot tub, I want to buy an ATV, that Mr. Lunsford would have asked for a purchase order and would have happily sold them to the church and would not have felt the need to cross-examine his customer about what the customer was going to do with these items.

Now, what was Mr. Dvorak supposed to do? Was he supposed to go investigate it himself? If you think back to Ms. Jeter's testimony, she said if the invoices had said computer, camcorder, video projector, television, generator, I wouldn't have questioned it. Now, she is in there after the fact with the Office of Professional Responsibility, and she said, I wouldn't even have questioned it then.

Mr. Dvorak is supposed to do better than that? He's supposed to be more exacting than the DEA internal auditor who is there with the Office of Professional Responsibility?

Okay, suppose we look at the other things, maybe the ATV or the lawn mowers. What's Mr. Dvorak supposed to do, call up Burchell's boss, who is in on the fraud? Is he supposed to call Jean Burchell? Is he supposed to call Bob Burchell and say, What's going on here? I think not. This is really an extraordinary argument the Government is making to you.

It's an extraordinary argument that Mr. Dvorak had an obligation to go behind the purchase orders from his customer, that he had to cross-examine his customer and continue his own investigation of every single transaction that a law-enforcement agency was conducting, that he has to conduct an independent investigation, that he should have done something to investigate the bona fides of these transactions.

And that, I suggest to you, is the most extraordinary argument the Government makes, because it suggests not just that Mr. Dvorak should have done that, but that because he failed do it, that he's guilty of a crime, that he is part of a conspiracy, that he made false statements, that he committed wire fraud, because he failed to conduct his own investigation of a law-enforcement agency.

I think that is an extraordinary argument, and if it were true, and if it were accepted, it's hard to imagine anybody doing business with the Government. It's hard to imagine the Government being able to do business with anybody.

Now, I suggest to you that if -- if -- Mr. Dvorak had done such a thing, he would have gotten a response from the DEA that reads an awful lot like Defense Exhibit No. 10, which you will have a chance to read, which says basically, we didn't ask you to ask questions. You do it my way or hit the highway. That's from the FBI.

Mr. Dvorak is supposed to investigate the investigators? I think this is really too much for the Government to ask of anybody, but it is really far too much to say you are guilty of a crime if you don't.

Let's talk for a moment about the charges. Mr. Dvorak is charged as an aider and abetter to wire fraud. You have to ask yourself, what act, what did he do to aid and abet the wire fraud?

You read the charges in the indictment. What they charge is that Burchell sent faxes ordering lazer disks over to Ritz. That's basically what those are. What did Mr. Dvorak do? Nothing. He received the faxes.

Now, on the false statements charge, the Government charges that Mr. Dvorak deliberately made false statements to the DEA with some bad purpose in mind, but, of course, the statements that Mr. Dvorak, the invoices that Mr. Dvorak sent to the DEA read exactly as Burchell told him they should read.

He didn't think he was cheating the DEA. He thought he was doing what the DEA wanted. Now, I'm going to leave it to you to decide whether if you call a computer a data device, it's false or it's not false. You don't need to hear what I have to say about that.

Now, let's talk about the conspiracy charge. Mr. Learned concedes that the Government has to prove beyond a reasonable doubt that in order to convict Mr. Dvorak of conspiracy you find that he had to have joined in the illegal purpose of Burchell.

But he didn't even know what Burchell was doing. How could he have joined in the purpose? He was selling him things, for sure. There is no doubt about that. He thought he was a customer. That's what he was doing, selling to his customer.

Now, ask yourself here whose testimony is more believable? Is it Mr. Dvorak's or Mr. Burchell's. You saw

them both testify. You saw how evasive Mr. Burchell was in his answers. You saw him acknowledge all the lies he has told in the past.

You saw Mr. Dvorak testify, and I suggest to you that his testimony was quite straightforward. And Mr. Learned asked him, Isn't it true that you did make some money on this? Well, he made some money from the commission at Global, and he also made his salary. And the money from the DEA purchases went into the pot of money at Ritz and went to his salary, but there's nothing extraordinary about that.

I suggest to you also that Mr. Dvorak's conduct shows that he wasn't carrying guilty thoughts in his own mind. Why keep all this paperwork, all these 78 exhibits? We have had the differences between the pro forma invoice and the regular invoice, the primary invoice generated by the accounting system. Why keep that if you know it's incriminating? Why produce it to the Government if you know it's incriminating?

He is not changing his invoices or purchase orders, as Burchell is. He's not whiting things out. He is not whiting it out where it says verbal, Burchell writing in purchase order numbers. Why keep track of the laser disks and the music if you know you are doing something wrong?

Burchell changes his testimony over time. He can't keep his story straight on the witness stand.

You know, I guess there is another aspect of this, and that is what happens at the end? When Burchell gets caught and he disappears from the DEA, Mr. Dvorak doesn't know anything about it.

He calls up trying to find him, and who does he get? He gets Geesman, who it turns out is in on it, and Geesman does sort of an -- he's evasive. Let's put it that way. He was evasive. That was Mr. Dvorak's testimony.

He said, You need to talk to Hendrix, his boss, and Hendrix is evasive. They are in the know about what happened. With Burchell, did Mr. Dvorak know anything? No, he's in the dark. In the dark at the end, just as he was at the beginning.

Now, to me, the most powerful reason that you have to have a doubt in this case is that Mr. Dvorak has no motive whatsoever to join this conspiracy. He gets nothing out of it. He gets no cash. He gets no trips. He gets no junkets. He gets no parties. He doesn't keep some of this stuff for himself. He just gets his ordinary salary and whatever kind of commissions he is entitled to from Global. That's it.

He doesn't have a personal relationship of any kind with Burchell. He didn't know him before. He doesn't develop a relationship while Burchell is doing all this buying. They are still Mr. Burchell and Mr. Dvorak to each other. He has no motive.

Now, as I said before, it's the Government's burden to prove its case beyond a reasonable doubt, and I suggest to you that when you think about the value of Mr. Burchell's testimony, for that reason alone you should have a reasonable doubt.

If you have some sense that the Government has not offered you enough evidence in this case, that I suggest to you is a reasonable doubt.

If you have the sense that if you left here and you have maybe some uncertainty, some doubt about whether Mr. Dvorak knew about this, then you must acquit. That's a reasonable doubt.

I suggest to you that Mr. Burchell's testimony is not enough to prove anything beyond a reasonable doubt. When the Government wants to put an honest businessman in jail, it carries a heavy burden.

You have to ask yourself why is it that Mr. Dvorak would jeopardize the business he built over the course of 20

years, that he and his partner slowly built up from a business that did three or four million dollars in sales to one that is ready to do almost ten million dollars this year?

Why would he jeopardize it for a customer that amounted to no more than five percent of his revenue for only four years? Ask yourself if that makes any sense. When they don't take dividends out of this company, they just built it up. Why would he risk any of that just to do business with DEA? Excuse me. Why would he risk his business to do illegal business? Why would he risk throwing away 20 years' worth of work for something that doesn't matter to him economically at all?

Now, I suggest to you that Mr. Burchell is too weak a witness to carry the heavy burden that the Government bears. His testimony is not worthy of belief. He is, by his own term, an everyday liar. Those weren't his words, but that's what he admitted to. He lied every day about this.

I ask you the question this way. Would you trust Mr. Burchell with important matters in your life? Would you hand him your wallet? Would you give him your house keys? If you wouldn't trust Mr. Burchell with something that important to you, I ask you not to trust him with the most important thing in the world to Mr. Dvorak, and that is his freedom.

So I ask you to reject this indictment that rests on the testimony of the everyday liar, Mr. Burchell. I ask you to find Mr. Dvorak not guilty. Thank you.

MS. LANGHORNE: Good morning, ladies and gentlemen. I want to respond to a few points that counsel has made. As both counsel have said, the key issue here is whether the defendant knowingly participated in the fraud on the DEA with Mr. Burchell. We submit that he did and that the evidence shows that.

One of counsel's main points is that the defendant had no motive to do this, that he didn't get anything out of this. Well, of course he did, ladies and gentlemen. He made money off this. It's absurd to say that he didn't.

What's Ritz Audio Visual in business for? To make money. And just like GM sells cars, and people who have 40-percent ownership interest in GM make a profit, the defendant made a profit in this case. He made money, and he received on one occasion a check in the amount of $5600 for the boat deal. That was related to the boat deal. Mr. Lunsford told you that was related to the boat deal.

The DEA was a big customer. These aren't nickel-and-dime transactions. There was over a million dollars worth of business between the DEA and Ritz Audio Visual. Ritz Audio Visual made a $280,000 profit off of these transactions.

Defense counsel wants you to believe that these transactions were just business as usual, that the defendant was dealing with the Government like he dealt with all his other Government clients. Whenever he had a purchase order, he matched the description on his invoice to the purchase order.

Well, this isn't a matter of not dotting his I's and crossing his T's on the invoices that he submitted to the Government. Take a look at these transactions. Take a look at Agent D'Antuono's exhibit. Compare the descriptions on the invoices that the defendant submitted to the DEA to those of the documents that were in the defendant's internal files. They are way off.

Mr. Lunsford admitted when confronted with some of the descriptions that they were unusual, and when asked about his transactions that he had with McLean Bible Church, when asked about, well, when you sold a boat or airplane or whatever it was to the church, did you ever describe it as some kind of computer part? Of course not. And that was with the Seventh-Day Adventist Church.

These legitimate transactions that the defendant had with the DEA, we don't allege that those were part of the scheme. But think about it. There were a couple of those over the course of four years, a couple of transactions, one involving antennas and one involving some tapes that were copied. Those aren't part of the scheme, but all the items, ladies and gentlemen, the lawn mowers, the boat, the golf clubs, the generator, the microwave oven, those are the items the Government alleges were part of this scheme.

The defendant wants you to think that he thought that the Government was involved in some kind of undercover operation, and that's why he didn't question anything. There is no evidence that with respect to the transactions that are charged in the indictment that they were for an undercover operation. Burchell never told him that. That's something he assumed. He assumed, based on his relationship with his brother, and he assumed that based on a statement another employee said to him.

Now, why would -- it makes no sense -- if these were undercover operation items, why does he need to hide the description from the DEA itself? These invoices were going to the DEA. The DEA knows what it's involved in. You don't need to call in his example a pinball machine something else. These statements are going to the DEA. Then know what they are buying.

And why ship the items to the defendant's -- to Burchell's home? Why talk about specific titles back and forth?

The defense has made a big deal over this Exhibit 18.1. When you go back to the jury room, I want you to take a close look at this. Take a look at Ritz's internal documents. You will see in there that it says, See purchase order, and there's a purchase order number on Ritz's internal documents.

As Mr. Learned said, How would he know that? How would he know that purchase order number? He claims-- he claims he knew it because Mr. Burchell told him, but this

document right here says, See purchase order. Take a look at it.

How would Mr. Burchell -- how would the defendant know the DEA's purchase order number if he didn't get the purchase order? He got the purchase order, and he deep-sixed it.

This invoice, again the stock number, remember that testimony about 182, the defense wants you to believe that Mr. Burchell knew that that stock number related to miscellaneous items. It doesn't make sense.

Mr. Burchell is a thief. He is a crook. He is a liar, and you should view his testimony with skepticism. You should look at it carefully. But does he really have a motive to lie here? You heard his testimony about getting any further reduction. He does not anticipate a further reduction.

Defense counsel made a big point about what his attorney said in court. Mr. Burchell said, I wasn't there. Mr. Burchell said, I had a subsequent conversation with my attorney. I don't expect to get any reduction.

You know you can believe what Mr. Burchell says, because you know conversations of the kind he testified about had to have taken place in order for Mr. Burchell to have trusted the defendant, in order for him to trust him, to buy things like a lawn mower, like a hot tub, like massage chairs.

We don't ask you to convict the defendant based upon Mr. Burchell's testimony alone. We don't ask you to do that. We ask you to look at all the transactions. Take a look at them. Take a look at how they started with audiovisual equipment.

Look at over time how they expanded movies to CDs, 3,000 CDs, 1900 movies, jet skis, hot tubs, robes, massage chairs. Take a look at that, and look at the descriptions on the invoices for these items. Lawn mower described as hardware. Generator described as AC device.

Boat and golf clubs, motherboard; microwave oven, microwave switch.

And then think about what the defendant said and about what he didn't say. He came in here, and he had every right not to take the stand. But he took the stand, and he gave you no explanation as to that incident that occurred with Mr. Williams and Mr. Lunsford relating to the projector that they had sold to the DEA. He didn't offer you any explanation about that.

Remember, Mr. Lunsford said, I can't believe it. The defendant just sat there because me knew what was going on. He didn't offer you an explanation, because there is no explanation, and the statement he made to Lunsford about the FBI coming, the first statement he told you about, he says, Oh, it was taken out of context, it was convoluted, something about the cost of doing business.

The second time he says, oh, well, yeah, that did relate to Mr. Burchell, but I said that because I had conversations with people at the DEA, conversations that made me -- I thought they were evasive in the conversations. That's why I was suspicious, and that's why I made that statement to Mr. Lunsford, because the DEA employees were evasive about where Mr. Burchell was, not because any of the transactions, any of the 70-plus transactions, that he had dealt with Mr. Burchell on. None of those raised any suspicion.

And when the FBI finally did come, because he knew they would be coming one day, what did he tell them about that? He said, I didn't think there were any transactions that were suspicious, nothing suspicious about his dealings with Mr. Tomlinson. There may have been dealings between Mr. Burchell and Mr. Tomlinson, may have. Nothing about a $5600 check.

Ladies and gentlemen, simply because the DEA didn't catch these transactions internally, just because they weren't picked up on the procurement review, doesn't mean the defendant is not guilty of the offenses with which he is

charged. It doesn't give him a license to steal simply because the DEA didn't pick up on it internally.

And, of course, you know these descriptions on these invoices mattered. The DEA made payments based on what was stated on the invoice. It mattered to the DEA what these documents said.

Ms. Jeter said as to certain items it would trigger a question just because of the nature of the description alone, just because of massage chair, just because of hot tub. She said, As to some, I might not question it, but what she did say, she said, In all cases I would compare the invoice to the purchase order, and if it didn't match, I would raise a question.

She also said, In those instances where there was in purchase order with the invoice, I would raise a question. Clearly, the invoices mattered.

Ladies and gentlemen, we didn't expect the defendant to conduct his own investigation. We didn't expect that at all, but what you don't expect is to have someone like the defendant do is to continue to deal, knowing that a DEA employee is engaged in fraud, to continue to deal in order to make money.

He did make money off these transactions. He made a profit, and over time, when you look at Agent D'Antuono's exhibit, you will see that that profit increased over time. The more comfortable he and Mr. Burchell got working together, the more money the defendant made on the scheme.

You have heard a lot of argument. You have heard a lot of evidence employed. You have heard testimony from a lot of people. Now is your opportunity to go back, weigh the evidence, take a close look at those documents, compare those documents that the DEA got with those that were in Ritz's files, and I'm confident that you will find this defendant guilty of all the offenses charged in the indictment.

THE COURT: I'm going to take a short recess before I charge the jury. We will take a short recess, and then you will hear the charge.

(Whereupon, a short recess was taken.)

THE COURT: Counsel approach the Bench.

(Whereupon, a conference was held at the Bench between Court and counsel, out of hearing of the jury, and was reported as follows:)

MR. STRASSER: Your Honor, I have one objection to put on the record about the Government's closing argument.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA

v.

ROBERT F. DVORAK

Defendant

CRIMINAL NO. 99-412-A
(Sentencing Date: 4-28-00)

SENTENCING MEMORANDUM OF THE UNITED STATES

I. INTRODUCTION

The United States has no objections to the United States Probation Officer's determination that the defendant's overall sentencing guideline offense level is 21 and his guideline range is 37 to 46 months. As set forth below, there is clear and convincing evidence for the enhancements set forth in the Probation Officer's Presentence Report.

The United States expects that a timely notice of appeal will be filed and that the defendant will ask the Court to stay his term of imprisonment during the pendency of the appeal. Relying on 18 U.S.C. § 3143 (b) (1) (B), the United States objects to any such release on the grounds that any such appeal would be for the purpose of delay and would fail to raise a substantial question of law or fact likely to result in a reversal or new trial.

II. THE EVIDENCE OF OBSTRUCTION OF JUSTICE (SECTION 3C1.1)

U.S.S.G. § 3C1.1 provides a two level enhancement if a defendant "willfully obstructed or impeded . . . the administration of justice during the investigation, prosecution, or sentencing of the instant offense." The government has the burden of proving the facts underlying an obstruction enhancement by a preponderance of the evidence. United States v. Nelson, 6 F.3d 1049, 1054 (4th Cir. 1993).

Grand Jury Document Obstruction

1. The Two Most Incriminating Documents Came From DEA, Not From Ritz

In the course of the trial, no document proved to be more incriminating than government exhibit #18.1 (page 1) -- DEA's copy of a $24,745 Ritz invoice of February 14, 1994, ostensibly selling DEA a "mounting kit, tube adapter, screen unit, generator, monitor unit, and support assembly." (Attachment A) Included in exhibit #18.1 (page 2) is DEA's copy of a purchase order addressed to Ritz, authorizing Ritz to sell DEA the very same technical equipment. (Attachment B). Burchell testified (and Dvorak's business partner Gary Lunsford confirmed) that Ritz did not sell technical equipment to DEA on this date. Rather both Burchell and Lunsford testified that this transaction was the first movie laser disc sale to DEA. (2/7: 71-72; 236-237, 239-240).

Lunsford testified that he had never seen exhibit #18.1 until it was shown to him in the U.S. Attorney's Office a few months before trial. (2/7: 237). According to Lunsford, there was no such invoice in the Ritz files when he looked. On the contrary, according to Lunsford, the invoice in the Ritz' files described the items sold on that date as "Laser Discs (Assorted Titles)." (Exhibit #18.2, page 1) (Attachment C) (2/7: 236). FBI Special Agent Steven D'Antuono confirmed as well that, in response to a December 1997 grand jury subpoena, Ritz never produced a copy of exhibit #18.1, pages

1 & 2. (Affidavit of Special Agent Steven D'Antuono: Attachment D). Instead, Ritz produced a copy of exhibit #18.2 in which the items sold were described as "Laser Discs (Assorted Titles)." In short, the incriminating exhibit #18.1 came from DEA, not from Ritz.

Burchell testified that he and Dvorak agreed upon the technical language used in exhibit #18.1 to cover the first laser disc sale. (2/7: 72). Dvorak, on the other hand, denied that there was any such agreement and denied that he had ever created exhibit #18.1, page 1, even though, by all appearances, the exhibit was a standard Ritz invoice. Dvorak testified that exhibit #18.2 (the "laser discs" invoice) was a genuine copy of what he had sent to DEA (not exhibit #18.1). Dvorak also testified that he had never received the DEA purchase order (exhibit #18.1, page 2) authorizing him to sell to DEA the technical equipment referred to in exhibit #18.1 page 1. Although he could not explain how it came about, Dvorak claimed to be totally ignorant of exhibit #18.1.[1] (2/8: 177-79).

2. Dvorak Removed The Two Incriminating Documents From Production And With Intent To Deceive The Grand Jury Altered A Third Document That Was Produced

A comparison of DEA's own set of documents with the documents produced by Ritz shows that Dvorak decided early on to conceal the existence of exhibit #18.1, pages 1 & 2, by

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[1] On direct examination, Dvorak testified that, given Ritz's standard business software and exhibit #18.1's non-conforming invoice number, it would be "impossible" for anyone at Ritz to create exhibit #18.1. (2/8: 182). On cross-examination, Dvorak corrected this and stated that it would be "nearly impossible". (2/8: 215). Lunsford, on the other hand, testified that Ritz's business software allowed one to "manually" enter the system and create exhibit #18.1 with a non-conforming invoice number. (2/7: 240).

not producing the Ritz copies of the two exhibits.[2] Dvorak admitted that, when Ritz was served with a grand jury subpoena, he was responsible for gathering the documents and delivering them (through the company's lawyer) to the FBI. (2/8: 213-214). In an effort to mislead the grand jury, Dvorak wrote a short note on a Ritz document (a handwritten order form) that was produced. The note stated falsely: "Copy of P.O. never received." (Exhibit #18.2, page 3: attachment E). The evidence for this obstruction of justice, which is explained below, is independent of Burchell's testimony and is gleaned from the documents themselves.

The anomaly Dvorak created in his own handwriting on the order form for transaction number 18 is apparent from Special Agent D'Antuono's analysis of the Ritz documents. Agent D'Antuono noted that Ritz produced a separate handwritten order form in 73 out of the 78 transactions. In 35 transactions (out of the 73 that included a Ritz order form), the phrase "See P.O." was written in the upper right hand corner in the shipping box location of the order form. In all of these 35 transactions, except for <u>one</u>, the Ritz documents included a copy of the DEA purchase order. The lone exception was transaction number 18, where an order form included the phrase "See P.O.", but the Ritz documents did not include a copy of the DEA purchase order.

Added to this fact is another irregularity. Agent D'Antuono noted that there were 34 transactions in which the Ritz documents did not include a DEA purchase order, but only in <u>one</u> case, namely, transaction number 18, was there a Ritz document that actually stated that a copy of the purchase order was never received. Moreover, there is yet another irregularity noted by Agent D'Antuono. Transaction number 18 is the only transaction in which (i) the Ritz order form

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[2] Since Lunsford could not locate in the Ritz files a copy of exhibit #18.1, when he was asked by the FBI in 1999 to research transaction number 18, Dvorak must have permanently removed the Ritz copies of exhibit #18.1 from the Ritz files. (D'Antuono Affidavit, attachment D).

correctly listed DEA's purchase order number but (ii) the Ritz documents had no copy of the actual purchase order.

Therefore, Dvorak is confronted with the fact that three separate and unusual events converge in a single order form that he himself prepared and that was in his custody at the time of grand jury production. Not only do these irregularities converge in a single document[3] but the document itself converges with the one transaction (out of 78) whose invoice Dvorak disavows.[4] But the remarkable coincidence associated with this document immediately vanishes if one draws another conclusion: that Dvorak removed the two incriminating documents and altered the order form with the false statement: "Copy of P.O. never received."

3. Dvorak's Grand Jury Obstruction Seriously Impaired His Testimony

Dvorak apparently decided early on in the investigation that while he could explain that he made subsequent sales of movies and music under such descriptions as "12 inch read only memory discs," "CD Roms," or "CD Rom Package," he would be hard pressed to explain that he initially sold laser discs to DEA under the description: "Mounting Kit, Tube Adapter, Screen Unit, Generator," etc. But Dvorak's fateful decision not to produce Ritz's copy of exhibit #18.1 had disastrous consequences for him at trial. At trial Dvorak was forced into the untenable position that exhibit #18.1 was created by Burchell by some unknown means. Whereas, had Dvorak complied with the subpoena and produced the troublesome invoice and purchase order in the first place, he would not have been forced to later disavow it completely. In short, although explaining the document was difficult, disavowing it altogether was suicidal.

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[3] Exhibit #18.2, page 3: attachment E.

[4] Exhibit #18.1, page 1: attachment A.

Not only was the invoice a problem for Dvorak at trial but so was the DEA purchase order. The purchase order used the same technical equipment language that was used on DEA's invoice. Obviously, if the Ritz files contained a copy of this purchase order, Dvorak would not be able to explain why he billed DEA for "laser discs" when the purchase order authorized him to sell to DEA "mounting kits, tube adapters," etc.

To explain the absence of a DEA purchase order in the Ritz files, Dvorak produced the order form for transaction number 18 but wrote on it the false statement "Copy of P.O. never received." This 1998 act of obstruction created additional complications for him at trial. The Ritz order form itself contained the correct DEA purchase order number ("91-94-189") written out in Dvorak's handwriting. The question arises: how did Dvorak know the correct purchase order number to put on his order form if he never received DEA's purchase order? Anticipating this problem, Dvorak testified that Burchell gave it to him over the telephone. (2/8: 177-178). But the order form contained in Dvorak's own handwriting, in the box set aside for the shipment location, the phrase "See P.O." Why would Dvorak write "See P.O." on the order form if he never received the purchase order in the first place? Moreover, why would Dvorak write "Copy of P.O. never received" on the same document in which he wrote "See P.O."?

4. Case Law Supports A Section 3C1.1 Enhancement Where The Defendant Engaged In Grand Jury Obstruction

The evidence at trial established that the FBI interviewed Dvorak on December 1, 1997. (2/8: 19-20). At that time the FBI served a grand jury subpoena on Ritz Audio Visual Associates. The subpoena called for the production of

> [a]ll documents including but not limited to, invoices, purchase orders, receipts, ledgers, checks, statements, memoranda, and letters containing the name of or

> relating to the Drug Enforcement Administration, the Department of Justice, or Robert S. (Bob) Burchell.

(Attachment D). Although he denied that he wrote anything on the subpoenaed records, Dvorak admitted that he was responsible for gathering the records and passing them on to his lawyer who forwarded them to the FBI. (2/8: 213-214).

"Section 3C1.1 is intended to apply to defendants who engage in 'conduct calculated to mislead or deceive authorities or those involved in a judicial proceeding' . . . and applies to a 'wide range of conduct.'" United States v. Ashers, 968 F.2d 411, 413 (4th Cir. 1992). There is abundant case law to the effect that any obstruction of the grand jury process falls within the ambit of Section 3C1.1. United States v. Williams, 96 F.3d 1452, 1996 WL 506190 (9th Cir. 1996) (enhancement found where the defendant "produced a false document in response to a grand jury subpoena in order to conceal his crimes") (unpublished: attachment G); United States v. Sumler, 96 F.3d 1440, 1996 WL 511483 (4th Cir. 1996) (enhancement found where the defendant "creat[ed] false records of past events after receiving a subpoena to produce his own records and the records of an institution with which he dealt") (unpublished: attachment G); United States v. Upton, 91 F.3d 677, 688 (5th Cir. 1996) (enhancement found based on the defendant's "untruthful testimony to the grand jury and his failure to produce all relevant documents ordered by a subpoena"); United States v. Austin, 54 F.3d 394, 403-404 (7th Cir. 1995) (enhancement found based on the defendant's "failure to turn records . . . over to the grand jury despite a subpoena").

III. DETERMINING THE DOLLAR LOSS FIGURE (2F1.1(b)(1))

The indictment charged that "[b]eginning sometime in 1993 or early 1994" the defendant conspired with Robert Burchell to defraud the DEA. From the evidence adduced at trial it is not clear exactly when in the early months Dvorak

had sufficient knowledge to knowingly participate in the conspiracy.

Burchell first began dealing with Dvorak in the summer of 1993. In their first transaction, referring to the Ritz invoices, Burchell told Dvorak that "[they] could not purchase these items unless the description of the items were vague." (2/7: 56). Transactions continued until February 1994. During that time period Burchell embezzled video projectors, TVs, and VCRs which were billed to DEA as "Display Adapters," "Display Assemblies," and "VDU Assemblies." In one case a camera was billed to DEA under the description "Graphic Recording Unit." (Exhibit #160: attachment F).

For the purpose of sentencing guidelines calculation and restitution and to avoid unnecessary argument, however, the Court may wish to begin the calculation of loss with transaction number 18 in February 1994. Emboldened by Dvorak's no-questions-asked willingness to supply invoices to him which contained false, incomplete, and misleading descriptions of the items sold, Burchell decided (in transaction number 18) to ask Dvorak to supply him with "hundreds" of movie laser discs and to bill them to DEA. (2/7: 68, 72). Dvorak not only agreed to order the laser discs but, more importantly, agreed with Burchell that Ritz would invoice DEA for the laser discs under the description: "Mounting Kits, Tube Adapters, Screen Units, RF Generators, and TBA Support Assemblies." (2/7: 72; Gov. Exhibits #18.1 and 161). When asked whether he was afraid that Dvorak might get suspicious and ask him why DEA needed $24,000 worth of movie laser discs, Burchell explained that on "numerous occasions" Dvorak "basically told [him] that anything that [he] wanted he [Dvorak] could get for [him]." (2/7: 69).

Accordingly, there can be no question that by February 1994 Dvorak knew that Burchell was involved in fraudulent activity. From that point on, whenever Burchell wanted Dvorak to furnish an incomplete, deceptive, or false invoice to DEA, Dvorak could not help but conclude that Burchell

was embezzling the equipment either for himself or others. The evidence of Burchell's embezzlements became blatant over time. For example, in October 1995 (transaction number 45), Burchell asked Dvorak to buy a vehicle cab cover for him and to bill it to DEA. In July 1996, Dvorak learned that a video projector that Burchell had ordered had been sold to the McLean Bible Church for $6000, a figure less than Ritz's wholesale price.

Government summary exhibit #160 details the differences between the item descriptions contained on DEA's copy of the Ritz invoice and the item descriptions contained either on Ritz's retained copy of the invoice or in other internal Ritz documents. Beginning at least by the 18th transaction in February 1994 are the items (identified in exhibit #160) that Dvorak had reason to believe were being embezzled. In some cases, involving i.e., trailers, an all terrain vehicle, generators, lawnmowers, cabinets, a jet ski, a snowblower, a vacuum cleaner, massage chairs, exercise equipment, and a hot tub with expensive towels and robes, Dvorak had specific knowledge that the items were being ordered for Burchell's personal use. Beginning with transaction number 18, government exhibit #160 documents a loss to DEA of **$805,674.28**.[5]

In addition to those items listed in exhibit #160, government summary exhibit #161 (attachment H) details the full **$217,311.04** that DEA paid for movie and music discs from February 1994 through September 1997. Added as well to the final figure is the **$65,000** that DEA paid Global Sales for a deck boat and golf clubs in 1996.

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[5] This figure is arrived at by subtracting $121,048.75 (the loss attributable to those transactions prior to transaction number 18) from the figure of $926,723.03, the overall loss reflected on government exhibit #160. Government exhibit #160, however, does not include the losses attributable to the purchase of movies and music and the deck boat and golf clubs.

When the figures are added up, it is clear that DEA suffered a Dvorak related loss of more than $800,000 but less than $1.5 million (specifically, at least **$1,087,985.32**).

IV. CONCLUSION

For the foregoing reasons and authorities, the United States submits that the defendant's sentencing guideline range of 37 to 46 months is fully supported by the record.

Respectfully submitted,

HELEN F. FAHEY
United States Attorney

/s/_____
Stephen P. Learned
Assistant United States Attorney

/s/_____
Dabney Langhorne
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of April, 2000, I have sent either by first class mail, United States Postal Service, or by overnight commercial carrier, a copy of the foregoing, namely, the government's sentencing memorandum to defendant's counsel set forth below:

Alan D. Strasser, Esq.
Nancy E. Nunan, Esq.
Kutak Rock
Suite 1000
1101 Connecticut Ave., N.W.
Washington, D.C. 20036-4374
Fax 202-828-2488

/s/_____
Stephen P. Learned

ATTACHMENT A

FED ID. # 52-1579640
DUNS # 19-064-2686

INVOICE

RITZ AUDIO-VISUAL ASSOCIATES INC.

6620 VIRGINIA MANOR ROAD
BELTSVILLE, MD 20705
(301) 419-3101 METRO/WASH.
(410) 813-2211 BALTO.
FAX: (301) 419-3105

SOLD TO:
DEAA/OSTC
ATTN/ GERRY BRAUND
8199 BACKLICK ROAD
LORTON VA 22079

SHIP TO:
DRUG ENFORCEMENT ADMINISTRATN
M/F: OSTC/ROBERT BURCHELL
8199 BACKLICK ROAD
LORTON VA 22079

INVOICE NUMBER	DATE	ORDER NUMBER	DATE	CUSTOMER NUMBER	CUSTOMER P.O. NUMBER	TERMS	SALESPERS
42286	2/14/94	38246	2/14/94	220939	91-94-189	NET 30 DAYS	2

MUST APPEAR ON CHECK

CUSTOMER PICKUP

STOCK NUMBER	DESCRIPTION	U/M	QUANTITY	UNIT PRICE	AMOUNT
82	PBM80 MOUNTING KIT	EA	1	259.950	259.95
[redacted]	APM2446 TUBE ADAPTER	EA	1	295.000	295.00
[redacted]	120A12B SCREEN UNIT	EA	2	1995.000	3990.00
82	DV RF GENERATOR	EA	1	14230.700	14230.70
82	DV MONITOR UNIT	EA	1	5745.000	5745.00
82	TBA SUPPORT ASSEMBLY.	EA	1	225.000	225.00
	Subtotal				~~24745.65~~
	Total Due				24745.65

APPROVED FOR PAYMENT

Robert S. Burchell

NO LATE PAY.

FEB 2 2 1994

94A-122911-J-122911-6539-2606-24745.65

GOVERNMENT EXHIBIT 18.1 99-412-A

APPENDIX01028

EXHIBIT PAGE 1

BEST AVAILABLE COPY

ATTACHMENT B

ORDER FOR SUPPLIES OR SERVICES

PAGE 1 OF 2 PAGES

PORTANT: Mark all packages and papers with contract and/or order numbers.

DATE OF ORDER	2. CONTRACT NO. (If any)	3. ORDER NO.	4. REQUISITION/REFERENCE NO.
February 14, 1994	GS03F2012A	91-94-189	

ISSUING OFFICE (Address correspondence to)

rug Enforcement Administration
199 Backlick Road
orton, VA 22079

6. SHIP TO: (Consignee and address, ZIP Code)

Drug Enforcement Administration
8199 Backlick Road
Lorton, VA 22079
SHIP VIA: M/F: OSTC/Robert Burchell

TO: CONTRACTOR (Name, address and ZIP Code)

ENERAL ELECTRIC COMPANY
o Ritz AV
520 Virginia Manor Road
eltsville, MD 20705

TTN: R. Dvorak

8. TYPE OF ORDER

☐ A. PURCHASE - Reference your _____

Please furnish the following on the terms and conditions specified on both sides of this order and on the attached sheets, if any, including delivery as indicated. This purchase is negotiated under authority of:

☒ B. DELIVERY - Except for billing instructions on the reverse, this delivery order is subject to instructions contained on this side only of this form and is issued subject to the terms and conditions of the above-numbered contract.

ACCOUNTING AND APPROPRIATION DATA

4A-122911-J-122911-6539-RET00-2606

10. REQUISITIONING OFFICE

Radio Communications

11. BUSINESS CLASSIFICATION (Check appropriate box(es))

☐ SMALL ☒ OTHER THAN SMALL ☐ DISADVANTAGED ☐ WOMEN-OWNED

12. F.O.B. POINT	14. GOVERNMENT B/L NO.	15. DELIVER TO F.O.B. POINT ON OR BEFORE (Date)	16. DISCOUNT TERMS
Destination		March 15, 1994	NET - 30
13. PLACE OF INSPECTION AND ACCEPTANCE			
Lorton, VA			

17. SCHEDULE (See reverse for Rejections)

ITEM NO. (A)	SUPPLIES OR SERVICES (B)	QUANTITY ORDERED (C)	UNIT (D)	UNIT PRICE (E)	AMOUNT (F)	QUANTITY ACCEPTED (G)
1.	PBM80 Mounting Kit	1	ea	259.95	259.95	
2.	APM2446 Tube Adapter	1	ea	295.00	295.00	
3.	120A12B Screen Unit	2	ea	1,995.00	3,990.00	
4.	DV RF Generator	1	ea	14,230.70	14,230.70	
5.	DV Monitor Unit	1	ea	5,745.00	5,745.00	
6.	TBA Support Assembly	1	ea	225.00	225.00	

EXHIBIT PAGE 2

FEB 18 1994

DEAAS INPUT

POSTED

SEE BILLING INSTRUCTIONS ON REVERSE	18. SHIPPING POINT	19. GROSS SHIPPING WEIGHT	20. INVOICE NO.	17(H). TOT. (Cont. pages)	
				$24,745.65	
	21. MAIL INVOICE TO: (Include ZIP Code) DEAA/OSTC, 8199 Backlick Road, Lorton, VA 22079 ATTN: Gerry Braund 703/557-2872		APPENDIX01030	$24,745.65	17(I). GRAND TOTAL

22. UNITED STATES OF AMERICA BY (Signature) ▶ Original Signed by

23. NAME (Typed)
Patricia Kascak
TITLE: CONTRACTING/ORDERING OFFICER

NSN 7540-01-152-8083 50347-101 OPTIONAL FORM 347 (10-83) Prescribed by GSA

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ATTACHMENT C

6620 VIRGINIA MANOR ROAD
BELTSVILLE, MD 20705
(301) 419-3101 METRO/WASH.
(410) 813-2211 BALTO.
FAX: (301) 419-3105

SOLD TO:

DEAA/OSTC
ATTN/GERRY BRAUND
8199 BACKLICK ROAD
LORTON VA 22079

SHIP TO:

DRUG ENFORCEMENT ADMINISTRATN
M/F: OSTC/ROBERT BURCHELL
8199 BACKLICK ROAD
LORTON VA 22079

INVOICE NUMBER	INVOICE DATE	ORDER NUMBER	ORDER DATE	CUSTOMER NUMBER	CUSTOMER PO NUMBER	TERMS	SALESPERSON
52863	2/14/94	47320	2/14/94	220939	91-94-189	NET 30 DAYS CUSTOMER PICKUP	2

STOCK NUMBER	DESCRIPTION	UM	QUANTITY	UNIT PRICE	AMOUNT
39-204-9005	LASER DISCS (ASSORTED TITLES	EA	1	24745.650	24745.65
	Subtotal				24745.65
	Total Due				24745.65

GOVERNMENT EXHIBIT

APPENDIX01032

EXHIBIT PAGE 1

ATTACHMENT D

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA

v.

ROBERT F. DVORAK

Defendant

CRIMINAL NO. 99-412-A

DECLARATION OF STEVEN D'ANTUONO

1. I, Steven D'Antuono, am a Special Agent of the Federal Bureau of Investigation, assigned to the Robert Dvorak investigation. As a result of that investigation, I have become familiar with the documents produced both from the Drug Enforcement Administration ("DEA") and from Ritz Audio Visual Associates ("Ritz") reflecting Ritz sales to DEA from March 1993 through September 1997.

2. Government Exhibits 1 through 78 admitted in evidence in the Dvorak trial represent documents obtained from the DEA and from Ritz regarding 78 sales during the relevant time period.

3. Ritz documents were produced as a result of a grand jury subpoena served on Gary Lunsford, as custodian of records for Ritz Audio Visual on December 1, 1997. (See attached subpoena and FBI memorandum). Ritz's lawyer, Alan Strasser, forwarded these documents to the FBI in 1998. I was unable to locate among the Ritz files that were delivered to the FBI a copy of government exhibit #18.1, pages 1 & 2. Later in 1999 Gary Lunsford was shown a copy of exhibit #18.1. He claimed to have never seen the document before.

Lunsford was then asked by the FBI to research the Ritz files in order to explain transaction number 18. Lunsford stated that he could not locate a Ritz copy of exhibit #18.1.

4. In all 78 transactions both DEA and Ritz had a copy of an invoice reflecting a sale. Government exhibits 1 through 78, included all invoices and all purchase orders for the 78 transactions that were produced by either the DEA or Ritz. DEA had purchase orders for 53 of the transactions. Ritz had purchase orders for 44 of the transactions.

5. In most cases, for each sale, the Ritz documents included copies of one or more invoices, a DEA generated purchase order, a "picking slip," a handwritten "Order Form," and miscellaneous correspondence regarding the items sold.

6. Ritz produced a separate handwritten Order Form for 73 out of the 78 transactions. In 35 transactions (out of the 73 that included an Order Form), the phrase "See P.O." was written in the upper right hand corner in the shipping box location of the order Form. In all of these 35 transactions, except for one, the Ritz documents included a copy of the DEA purchase order. The lone exception was transaction number 18, where an Order Form included the phrase "See P.O.", but the Ritz documents did not include a copy of the DEA purchase order.

7. There were 34 transactions in which the Ritz documents did not include a DEA purchase order. Out of these 34 transactions, only in transaction number 18 was there a Ritz document that actually stated that a copy of the purchase order was never received.

8. Transaction number 18 was the only transaction in which (i) the Ritz Order Form correctly listed DEA's purchase order number but (ii) the Ritz documents had no copy of the actual purchase order.

9. I declare under penalty of perjury that the foregoing is true and correct.

4/5/00
Date

/s/_____
Steven D'Antuono

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 12-02-1997

On December 1, 1997, I served the original of the attached subpoena on GARY DALE LUNSFORD, born June 24, 1954, President of RITZ AUDIO-VISUAL ASSOCIATES, INC. (RITZ).

I accomplished service at the offices of RITZ, 6620 Virginia Manor Road, Beltsville, Maryland.

APPENDIX01037

Investigation on 12-01-1997 at Beltsville, Maryland

File # 46H-WF-208148 Sub 302-92 Date dictated 12-02-1997

by SA Damon A. Katz DAK

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency.

United States District Court

EASTERN DISTRICT OF VIRGINIA

TO:

Custodian of Records
Ritz Audio Visual
6620 Virginia Manor Rd
Beltsville, MD 20705

SUBPOENA TO TESTIFY BEFORE GRAND JURY

SUBPOENA FOR:

☐ PERSON ☑ DOCUMENT(S) OR OBJECT(S)

YOU ARE HEREBY COMMANDED to appear and testify before the Grand Jury of the United States District Court at the place, date, and time specified below.

PLACE	COURTROOM
United States District Courthouse 401 Courthouse Square Alexandria, Virginia 22314	Grand Jury Room
	DATE AND TIME 9:30 a.m. December 9, 1997

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):*

All documents including but not limited to, invoices, purchase orders, receipts, ledgers, checks, statements, memoranda, and letters containing the name of or relating to the Drug Enforcement Administration, the Department of Justice, or Robert S. ("Bob") Burchell.

☐ *Please see additional information on reverse*

This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

CLERK	DATE
NORMAN H. MEYER, JR., CLERK OF THE COURT	11/26/97
(BY) DEPUTY CLERK Marialisa Clark	

This subpoena is issued on application of the United States of America United States Attorney	NAME, ADDRESS AND PHONE NUMBER OF ASSISTANT U.S. ATTORNEY Stephen P. Learned, AUSA (703)299-3700 SPL 2100 Jamieson Avenue Alexandria, VA 22314

*If not applicable, enter "none"

APPENDIX01038

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AO 110 (Rev. 12/89) Subpoena to Testify Before Grand Jury

RETURN OF SERVICE [1]

RECEIVED BY SERVER	DATE 12-1-97	PLACE USAO Alexandria, VA
SERVED	DATE 12-1-97	PLACE 6620 Virginia Manor Rd Beltsville, MD

SERVED ON (PRINT NAME): Gary Dale Lunsford, President

SERVED BY (PRINT NAME)	TITLE
SA Damon A. Katz	Special Agent, FBI

STATEMENT OF SERVICE FEES

TRAVEL	SERVICES	TOTAL

DECLARATION OF SERVER [2]

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.

Executed on 12-2-97 (Date) Damon A. Katz (Signature of Server)

601 4th Street, N.W.D.C. (Address of Server)

Additional Information

APPENDIX01039

[1] As to who may serve a subpoena and the manner of its service see Rule 17(d), Federal Rules of Criminal Procedure, or Rule 45(c), Federal Rules of Civil Procedure.

[2] [illegible]Fees and mileage need not be tend[illegible] to the witness upon service of a subpoena is[illegible] on behalf of the United States or an[illegible] Federal Rules of Civil Procedure: Rule 17(d), F[illegible] Rules of Criminal Procedure) or on

GRAND JURY SUBPOENA DUCES TECUM REPORT

TO: FBI - SA - Damon Katz - (703) 762-3378.

RE: John Doe No. A97-208 Grand Jury No. & Date 97-4 - 12/9/97
Date subpoena Issued: 11/21/97
Person/Company subpoenad: Ritz Audio Visual
6620 Virginia Manor Rd
Beltsville, MD 20705

Below is the Grand Jury Subpoena Duces Tecum Report which must be completed and returned with the return of service copy of the subpoena to the address below when the records are received.

Remember, if these records are from C&P Telephone Company OR New York Telephone, they will not honor our recertification letters unless we provide them with their file number which is attached to the records. Please write that number in the space provided below.

Telephone File Number: _____ Recertify Date:_____ N/A_____

Please return the return of service subpoena and completed form to:
Linda Walls, Grand Jury Clerk
U.S. Attorney's office
2100 Jamieson Avenue
Alexandria, VA 22314

DATE SUBPOENA SERVED BY AGENT/USAO: _____
OR:
_____ Unable to Serve
_____ Subpoena Reissued_____

STATUS OF COMPLIANCE:

_____ NO RECORDS EXIST
_____ All Records Received on _____[date]
_____ Partial Receipt of Records w/no more records to follow _____[date]
Location of records received: _____
_____

HOW THE RECORDS WERE RECEIVED:

_____ In Mail to AUSA
_____ In Mail to Agent
_____ Agent Picked up from: _____
Returned before the Grand Jury _____
Other: _____

If there are any questions regarding this form, please call Linda Walls at (703)299-3760.

APPENDIX01040

ATTACHMENT E

RITZ AUDIO-VISUAL ASSOCIATES INC.

1600

PACKING LIST # 11520

DATE 2/14/94

TELEPHONE #

FAX #

CONTACT Bob Buschelle

DER FORM

COUNT # 220959

TO

SHIP

SALES REP K TAX EX TERMS N30 P.O. 91-94-189

SHIPPING INSTRUCTIONS Cust Pickup Already Has TRANS TYPE: CASH CREDIT C.O.D. CHARGE

TYPE OF CHARGE: RITZ VISA MASTER AMEX

ACCOUNT # EXP. DATE TAX EXEMPT #

STOCK #	QUANTITY	DESCRIPTION	UNIT PRICE	PRICE
204.9005	1	Lotus Disas (Assorted Titles)	24.95	24.95

ES

DIT CARD AUTH. #

ERENCE #

TAX	
SHIP CHRGS	
AMOUNT PAID	

Copy of P.O. Never Received

APPENDIX01042

EXHIBIT PAGE 3

ATTACHMENT F

SUMMARY OF RITZ SALES TO DEA
(1993-1997)

EXHIBIT NUMBER	INVOICE DATE (DEA COPY)	INVOICE # (DEA COPY)	INVOICE DATE (RITZ COPY)	INVOICE # (RITZ COPY)	QUANTITY	STOCK NUMBER	DESCRIPTION ON INVOICE SENT TO DEA	DESCRIPTION ON INTERNAL RITZ DOCUMENTS	COST TO RITZ	INVOICED TO DEA	PROFIT	GROSS PROFIT %
7	7/8/93	47146	7/8/93	47146	1	59-126-0901	901 SERIES DISPLAY ASSEMBLY	GE 901 DISPLAY ASSY VIDEO PROJECTOR	$ 11,695.00	$ 14,471.25	$ 2,776.25	24%
7	7/8/93	47146	7/8/93	47146	1	59-602-5715	XC3715C DV MONITOR UNIT	XC3715C MITSUBISHI 37" MONITOR	$ 4,850.00	$ 5,745.00	$ 895.00	18%
7	7/8/93	47146	7/8/93	47146	2	85-617-6120	120A12B STEWART 2000 SCREEN UNIT	120A12B STEWART 2000 SCREEN UNIT	$ 3,185.00	$ 3,990.00	$ 805.00	25%
8	7/8/93	47147	7/8/93	47147	1	59-602-5715	XC3715C DISPLAY ASSEMBLY	XC3715C MITSUBISHI 37" MONITOR	$ 4,850.00	$ 5,745.00	$ 895.00	18%
8	7/8/93	47147	7/8/93	47147	2	59-280-1002	VL-HL100UP VC R/PB UNIT	VLHL100UP SHARP VIEW CAM	$ 2,170.00	$ 3,598.00	$ 1,428.00	66%
8	7/8/93	47147	7/8/93	47147	3	59-208-3000	EVS-3000-HI8 R/PB UNIT	SONY EVS-3000 HI 8 VCR	$ 4,089.12	$ 4,702.50	$ 613.38	15%
8	7/8/93	47147	7/8/93	47147	2	54-155-2007	IS-3 STATIONARY GRAPHIC RECORDER	OLYMPUS IS-3 CAMERA	$ 938.60	$ 1,090.00	$ 151.40	16%
10	7/14/93	47296	7/14/93	47296	1	59-126-0901	M-901 ANALOG DISPLAY UNIT	M-901 ANALOG DISPLAY UNIT	$ 11,695.00	$ 14,471.25	$ 2,776.25	24%
10	7/14/93	47296	7/14/93	47296	3	59-208-3000	EVS-3000 SONY HI-8 VCR	SONY EVS-3000 HI 8 VCR	$ 4,089.12	$ 4,702.50	$ 613.38	15%
10	7/14/93	47296	7/14/93	47296	2	59-208-6101	CCD-TR101 SONY HI-8 HANDYCAM	CCD-TR101 SONY HI-8 HANDYCAM	$ 2,602.88	$ 2,998.00	$ 395.12	15%
11	7/23/93	47567	7/23/93	47567	3	59-280-102	VL-HL100UP VC DISPLAY ASSEMBLY	SHARP VIEWCAMS	$ 3,255.00	$ 5,397.00	$ 2,142.00	66%
11	7/23/93	47567	7/23/93	47567	4	54-155-1503	54-155-1503 GRD STYLUS	OLYMPUS STYLUS CAMERA	$ 397.32	$ 459.80	$ 62.48	16%
11	7/23/93	47567	7/23/93	47567	1	54-149-6009	9XI GRAPHIC RECORDING UNIT	MINOLTA 9XI W/DATABALL	$ 756.00	$ 869.00	$ 113.00	15%
11	7/23/93	47567	7/23/93	47567	3	59-208-3000	EV-S3000-HI8 DISPLAY ADAPTER	EVS-3000 SONY HI-8 VCR	$ 4,089.12	$ 4,702.50	$ 613.38	15%
12	8/16/93	48143	8/16/93	48143	2	59-239-6005	PT-60WXF5 VDU ASSEMBLY	16:9 CINEMAVISION 60" TELEVISION	$ 6,800.00	$ 9,000.00	$ 2,200.00	32%
13	8/20/93	48143	8/20/93	48303	1	59-204-5015	P-97 VDU ASSEMBLY	PRO 97 PIONEER ELITE TV	$ 3,800.00	$ 5,100.00	$ 1,300.00	34%
14	8/31/93	48615	8/31/93	48615	2	59-208-5001	CCD MODULE VX3	CCD VX3 SONY		$ 7,190.00	$ 7,190.00	
14	8/31/93	48615	8/31/93	48615	2	59-239-0770	CCD MODULE P70	PVS-770 PANASONIC	$ 2,250.00	$ 2,700.00	$ 450.00	20%
15	11/10/93	50799	11/10/93	50799	2	59-280-0800	800 LCD PANEL	XG-E800U SHARP LCD VIDEO/COMP PROJECTOR	$ 15,390.00	$ 19,990.00	$ 4,600.00	30%
16	12/3/93	51318	12/3/93	51318	1	84-417-4000	28A4000 ILLUMATION PANEL SN 1793997	ILLUMINATION PANEL 28A4000	$ 463.00	$ 599.95	$ 136.95	30%
17	1/10/94	52106	1/10/94	52106	3	52-239-5680	RXDY680 MULTI-FUNCTION BOX	PANASONIC AM/FM/CD BOOMBOX	$ 732.60	$ 927.00	$ 194.40	27%
17	1/10/94	52106	1/10/94	52106	4	45-280-7000	PI-7000 EXPERT PAD	SHARP EXPERT PAD	$ 2,181.04	$ 2,600.00	$ 418.96	19%
20	7/21/94	56532	7/21/94	56532	1	45-616-6270	270C DUO ASSEMBLY	270C APPLE POWERBOOK 12/240 W/MODEM	$ 2,939.00	$ 3,000.00	$ 61.00	2%
20	7/21/94	56532	7/21/94	56532	2	59-208-5701	TR700 VC UNIT	SONY CAMCORDER	$ 2,805.46	$ 3,230.00	$ 424.54	15%
20	7/21/94	56532	7/21/94	56532	2	45-616-6008	360 LW SELECT 360 PACKAGE	LASERWRITER SELECT 360 PRINTER	$ 2,654.00	$ 3,192.00	$ 538.00	20%
21	7/21/94	56533	7/21/94	56533	4	59-239-2730	CT276F31 GA00 SCREEN ASSEMBLY	PANASONIC GA00 27" TV	$ 2,700.00	$ 3,199.80	$ 499.80	19%
21	7/21/94	56533	7/21/94	56533	2	59-239-3130	CT316F31 GA00 SCREEN ASSEMBLY	PANASONIC GA00 31" TV	$ 2,100.00	$ 2,500.00	$ 400.00	19%
21	7/21/94	56533	7/21/94	56533	3	59-239-1970	AG1970 IND VT UNIT	PANASONIC AG-1970 EDIT VCR	$ 4,080.00	$ 4,467.75	$ 387.75	10%

176a

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GOVERNMENT EXHIBIT 46

EXHIBIT NUMBER	INVOICE DATE (DEA COPY)	INVOICE # (DEA COPY)	INVOICE DATE (RITZ COPY)	INVOICE # (RITZ COPY)	QUANTITY	STOCK NUMBER	DESCRIPTION ON INVOICE SENT TO DEA	DESCRIPTION ON INTERNAL RITZ DOCUMENTS	COST TO RITZ	INVOICED TO DEA	PROFIT	GROSS PROFIT %
21	7/21/94	56533	7/21/94	56533	5	59-208-7000	EV87000 8M PROCESSOR BOARD	SONY 8MM VCR	$ 7,568.80	$ 8,875.00	$ 1,316.20	17%
21	7/21/94	56533	7/21/94	56533	4	59-239-2521	CT20S21 SCREEN UNIT	PANASONIC 20" COLOR TV	$ 1,200.00	$ 1,380.00	$ 180.00	15%
22	7/27/94	56662	7/27/94	56662	2	45-616-5003	#100 QT 100 QUICKTAKE UNIT	QUICK TAKE 100 APPLE CAMERA	$ 1,308.00	$ 1,500.00	$ 192.00	15%
22	7/27/94	56662	7/27/94	56662	1	45-616-8100	#M2297LL/A PM 8100 CPU ASSEMBLY	APPLE POWERMAC 8100/80 16/1000CD COMPUTER	$ 5,224.75	$ 6,008.50	$ 783.75	15%
22	7/27/94	56662	7/27/94	56662	1	45-616-2963	#M2612LL/A DISPLAY ASSEMBLY	APPLE 20" MULTISCAN DISPLAY	$ 1,863.00	$ 2,163.00	$ 300.00	16%
22	7/27/94	56662	7/27/94	56662	1	45-616-2296	#M2611LL/A DISPLAY ASSEMBLY	APPLE 17" DISPLAY MONITOR	$ 1,099.00	$ 1,099.00	$ -	0%
22	7/27/94	56662	7/27/94	56662	1	54-153-0014	#54-153-0014 CSCAN UNIT	NIKON COOL SCAN F/MACINTOSH	$ 1,626.45	$ 1,950.00	$ 323.55	20%
22	7/27/94	56662	7/27/94	56662	2	59-280-3000	#VLH400UP VC PACKAGE	SHARP VIEWCAM CAMCORDER		$ 3,565.00	$ 3,565.00	
22	7/27/94	56662	7/27/94	56662	3	59-208-7000	#EV87000 8M PROCESSOR BOARD	SONY 8MM VCR	$ 4,535.28	$ 5,325.00	$ 789.72	17%
22	7/27/94	56662	7/27/94	56662	1	59-239-1970	AG-1970 VT UNIT	AG-1970 EDIT VCR	$ 1,360.00	$ 1,489.25	$ 129.25	10%
23	8/5/94	56931	8/5/94	56931	1	45-616-5018	280C PB ASSEMBLY	280C PB MAC COMPUTER	$ 3,719.00	$ 4,279.00	$ 560.00	15%
23	8/5/94	56931	8/5/94	56931	2	59-239-0455	AG455U VC ASSEMBLY	AG-455U CAMCORDER	$ 3,180.00	$ 3,816.00	$ 636.00	20%
23	8/5/94	56931	8/5/94	56931	1	45-616-5006	360 SELECT PRINTER ASSEMBLY	LASERWRITER 360 SELECT	$ 1,327.00	$ 1,596.00	$ 269.00	20%
23	8/5/94	56931	8/5/94	56931	1	45-616-5022	540C PB ASSEMBLY	APPLE 540-C POWERBOOK COMPUTER	$ 4,817.00	$ 5,550.00	$ 733.00	15%
23	8/5/94	56931	8/5/94	56931	1	59-239-2521	CT20S21 NTSC DISPLAY	CT-20S21 PANASONIC COLOR TV	$ 300.00	$ 345.00	$ 45.00	15%
23	8/5/94	56931	8/5/94	56931	1	59-239-2730	CT27F31 EXTENDED NTSC DISPLAY	CT-27SF31 PANASONIC COLOR TV	$ 675.00	$ 799.95	$ 124.95	19%
23	8/5/94	56931	8/5/94	56931	1	59-280-0650	XG-E850U 3-PANEL TFT ASSY	SHARP XG-E850U VIDEO PROJECTOR	$ 12,300.00	$ 15,792.00	$ 3,492.00	28%
24	8/15/94	57120	8/15/94	57120	2	59-208-8001	VX-3 DEVICE TESTER ASSEMBLY	VX-3 SONY CAMCORDER	$ 5,800.00	$ 6,670.00	$ 870.00	15%
29	2/10/95	61211	2/10/95	61211	3	59-280-0410	VC ASSEMBLY	SHARP 410 CAMCORDER	$ 4,275.00	$ 5,520.00	$ 1,245.00	29%
30	2/15/95	61347	2/15/95	61347	2	45-616-5271	NPN-120 MESSAGEPAD 120	NEWTON MESSAGEPAD 120 (2-MEG)	$ 1,314.00	$ 1,599.90	$ 285.90	22%
30	2/15/95	61347	2/15/95	61347	2	59-204-5124	DSS2430RW RECEIVER	RCA DSS2430RW DSS SATELLITE RECEIVER (2-RECEIVER MODEL)	$ 1,548.00	$ 1,948.00	$ 400.00	26%
31	4/13/95	62542	4/13/95	62542	2	59-204-5125	DSDRD102 SECONDARY RECEIVER	RCA DSDRD102 DSS RECEIVER	$ 1,060.00	$ 1,359.90	$ 299.90	28%
31	4/13/95	62542	4/13/95	62542	9	52-204-7000	V8X99 RECEIVER BOARD (VHF)	PIONEER ELITE V8X-99 RECEIVER	$ 15,120.00	$ 19,656.00	$ 4,536.00	30%
35	7/6/95	64276	7/6/95	64276	4	52-204-7002	PDF109 INPUT MODULE	PIONEER ELITE PDF-109 100-DISC CD CHANGER	$ 2,800.00	$ 3,640.00	$ 840.00	30%
35	7/6/95	64276	7/6/95	64276	4	59-204-7000	CLD99 OPTICAL SENSOR	PIONEER ELITE CLD-99 LASER DISC PLAYER	$ 7,680.00	$ 9,984.00	$ 2,304.00	30%
36	7/6/95	64277	7/6/95	64277	2	59-204-7099	PRO99 RP DISPLAY UNIT	PIONEER ELITE PRO-99 REAR PROJ TELEVISION	$ 7,200.00	$ 9,360.00	$ 2,160.00	30%
36	7/6/95	64277	7/6/95	64277	1	45-616-7000	M2471/A 16/600 PRINT ASSEMBLY	APPLE LASERWRITER 16/600PS 8MB	$ 2,079.37	$ 2,391.60	$ 312.13	15%
36	7/6/95	64277	7/6/95	64277	5	52-204-7004	CTW79 DUAL CARTRIDGE ASSEMBLY	PIONEER ELITE CTW-79 DUAL CASSETTE DECK	$ 2,180.00	$ 2,749.75	$ 569.75	26%
37	7/6/95	64278	7/6/95	64278								

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SUMMARY OF RITZ SALES TO DE
(1993-199

EXHIBIT NUMBER	INVOICE DATE (DEA COPY)	INVOICE # (DEA COPY)	INVOICE DATE (RITZ COPY)	INVOICE # (RITZ COPY)	QUANTITY	STOCK NUMBER	DESCRIPTION ON INVOICE SENT TO DEA	DESCRIPTION ON INTERNAL RITZ DOCUMENTS	COST TO RITZ	INVOICED TO DEA	PROFIT	GROSS PROFIT %
37	7/6/95	64278	7/6/95	64278	3	52-204-7006	PDAP1 CONTROLLER	PIONEER ELITE PD-AP1 CONTROLLER	$ 624.00	$ 795.00	$ 171.00	27%
37	7/6/95	64278	7/6/95	64278	4	52-204-7006	GR777 AUDIO CONTROL BOARD	PIONEER ELITE GR-777 EQUALIZER	$ 1,312.00	$ 1,660.00	$ 348.00	27%
37	7/6/95	64278	7/6/95	64278	2	59-204-7100	CLDA100 PB UNIT	PIONEER CLD-A100 LASER DISC PLAYER	$ 698.00	$ 839.90	$ 141.90	20%
39	7/19/95	64571	7/19/95	64571	1	45-616-9501	M4423LL/A 9500 POWER UNIT	9500/132 16/2G APPLE POWERMAC COMPUTER W/CD-ROM M4423LL/A	$ 4,990.00	$ 5,490.00	$ 500.00	10%
39	7/19/95	64571	7/19/95	64571	4	59-502-5718	HSU770 TAPE READER UNIT	HS-U770 MITSUBISHI VCR	$ 2,948.00	$ 3,540.00	$ 592.00	20%
40	7/28/95	1534	7/28/95	66940	2	59-280-1000	XG-E6000U DISPLAY MODULE	NG-E1000 SHARP LCD VIDEO PROJECTOR	$ 12,300.00	$ 19,990.00	$ 7,690.00	63%
40	7/28/95	1534	7/28/95	66940	1	54-139-0190	191-1625 DIGICAM 40 MOUNTING UNIT	KODAK DIGITAL CAMERA 40	$ 866.50	$ 995.00	$ 128.50	15%
41	8/16/95	65136	8/16/95	65136	2	59-502-5718	HSU770 VC POWER UNIT	HS-U770 MITSUBISHI VCR	$ 1,474.00	$ 1,770.00	$ 296.00	20%
41	8/16/95	65136	8/16/95	65136	1	54-139-0190	191-1625 DIGICAM 40 MOUNT W/POWER SUPPLY	KODAK DIGITAL CAMERA 40	$ 866.25	$ 995.00	$ 128.75	15%
41	8/16/95	65136	8/16/95	65136	1	52-239-9060	KXTD1232 KSU UNIT	KX-TD1232 PANASONIC KSU UNIT	$ 1,349.00	$ 1,686.25	$ 337.25	25%
41	8/16/95	65136	8/16/95	65136	1	52-204-7002	PDF109 INPUT MODULE	PIONEER ELITE PDF-109 100-DISC CD CHANGER	$ 700.00	$ 910.00	$ 210.00	30%
41	8/16/95	65136	8/16/95	65136	3	59-204-7000	CLD99 OPTICAL SENSOR	PIONEER ELITE CLD-99 LASER DISC PLAYER	$ 5,760.00	$ 7,488.00	$ 1,728.00	30%
41	8/16/95	65136	8/16/95	65136	2	59-204-7006	PACN10 ROM MODULE	PIONEER PACN10 ROM MODULE	$ 580.00	$ 725.00	$ 145.00	25%
41	8/16/95	65136	8/16/95	65136	2	59-204-7010	PACS10 ROM MODULE	PIONEER PACS10 ROM MODULE	$ 580.00	$ 725.00	$ 145.00	25%
41	8/16/95	65136	8/16/95	65136	1	45-616-2600	M2809LL/B PB500 SERIES PROGRAM ASSEMBLY	APPLE POWERBOOK 4/320	$ 2,800.00	$ 3,220.00	$ 420.00	15%
41	8/16/95	65136	8/16/95	65136	1	45-616-7004	M3516LL/A RF TEXT SYSTEM	APPLE MOBILE MESSAGING	$ 459.26	$ 528.15	$ 68.89	15%
42	8/24/95	65330	8/24/95	65330	2	59-777-6961	L100 LCD DISPLAY ASSEMBLY	LCD-100 AMPRO LCD VIDEO PROJECTOR	$ 12,998.00	$ 15,390.00	$ 2,392.00	18%
43	8/30/95	65472	8/30/95	65472	1	45-616-9501	M4423LL/A 9500 POWER UNIT	9500/132 16/2G APPLE POWERMAC COMPUTER W/CD-ROM M4423LL/A	$ 4,990.00	$ 5,490.00	$ 500.00	10%
45	10/12/95	952	10/12/95	66317	2	52-204-5147	JVC KSRX-147 ELECTRONIC BOX	JVC KSRX-147 CAR STEREO	$ 195.98	$ 459.90	$ 263.92	135%
45	10/12/95	952	10/12/95	66317	2	52-204-5025	ELECTRONIC TUBE	PYLE T-1000A CAR TUBE SPEAKER	$ 359.98	$ 500.00	$ 140.02	39%
45	10/12/95	952	10/12/95	66317	1	182	COVER	MISCELLANEOUS MDSE VEHICLE COVER	$ 817.50	$ 995.00	$ 177.50	22%
46	10/20/95	1119	10/20/95	66489	1	52-204-5255	KRC-901	KENWOOD KRC-901 CAR STEREO	$ 309.00	$ 432.00	$ 123.00	40%
46	10/20/95	1119	10/20/95	66489	1	52-204-5256	KDC-C803	KENWOOD KDCC-803 CAR CD PLAYER	$ 300.00	$ 420.00	$ 120.00	40%
47	10/31/95	1135	10/31/95	66736	1	182	TSTW CONTAINER	TSTW 5X8 CONTAINER-TRAILER	$ 1,304.95	$ 1,604.95	$ 300.00	23%
48	11/22/95	1119	11/28/95	67273	1	59-280-9000	VL-70 DISPLAY	SHARP VLE-40 VIEWCAM (PAL SECAM VERSION)	$ 890.00	$ 1,125.00	$ 235.00	26%
48	11/22/95	1119	11/28/95	67273	1	54-149-9000	F-140EX DISPLAY	MINOLTA F-140EX QUARTZ DATE KIT	$ 345.00	$ 429.00	$ 84.00	24%
49	1/17/96	156	1/17/96	68066	1	182	TW-122 CONTAINER	TW-122 CONTAINER/TRAILER	$ 4,906.91	$ 5,888.30	$ 981.39	20%

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EXHIBIT NUMBER	INVOICE DATE (DEA COPY)	INVOICE # (DEA COPY)	INVOICE DATE (RITZ COPY)	INVOICE # (RITZ COPY)	QUANTITY	STOCK NUMBER	DESCRIPTION ON INVOICE SENT TO DEA	DESCRIPTION ON INTERNAL RITZ DOCUMENTS	COST TO RITZ	INVOICED TO DEA	PROFIT	GROSS PROFIT %
49	1/17/96	156	1/17/96	68066	4	54-149-8000	140EX QD-ELEC. ASSY.	MINOLTA F-140EX QUARTZ DATE KIT	$ 1,380.00	$ 1,716.00	$ 336.00	24%
49	1/17/96	156	1/17/96	68066	1	52-239-8600	CXDPFM600 ROM DRIVE	CX-DPFM600 PANASONIC 6 DISC CAR CD PLAYER	$ 309.99	$ 376.00	$ 66.01	21%
51	4/26/96	4211	5/30/96	71260	2	59-280-1000	XG-E1000U LCD DISPLAY DEVICE	XG-E1000U SHARP LCD VIDEO PR S/N 603314753 603314519	$ 12,300.00	$ 17,900.00	$ 5,600.00	46%
52	4/30/96	70606	4/30/96	70606	2	69-139-8000	85501632 DC50 CONTROL UNIT	KODAK DC-50 DIGITAL CAMERA	$ 1,712.00	$ 2,192.00	$ 480.00	28%
52	4/30/96	70606	4/30/96	70606	3	45-816-5041	H0188LL/A MP DISPLAY ASSEMBLY	APPLE NEWTON 130 MESSAGE PAD	$ 2,178.00	$ 2,645.85	$ 467.85	21%
52	4/30/96	70606	4/30/96	70606	1	45-816-8044	M4221LL/A PB DUO-2300 BOARD	APPLE POWERBOOK DUO 2300C/100 (20MB RAM/1.1GB HD/14.4 MODEM)	$ 3,973.00	$ 4,754.10	$ 781.10	20%
52	4/30/96	70606	4/30/96	70606	1	59-280-1000	59-280-1000 LCD DISPLAY UNIT SERIAL NUMBERS: 603314552	SHARP XG-E-1000U LCD PROJECTOR	$ 6,150.00	$ 8,950.00	$ 2,800.00	46%
53	5/16/96	1257	5/31/96	71289	1	52-239-8600	READ ONLY DEVICE	CX-DPFM600 PANASONIC 6 DISC CAR CD PLAYER	$ 249.00	$ 376.00	$ 127.00	51%
53	5/16/96	1257	5/31/96	71289	1	52-204-5400	TRX400FWT CARRYING UNIT	TRX-400 FWT CARRY-ALL UNIT W/ACCESSORIES	$ 7,633.20	$ 8,899.90	$ 1,266.70	17%
53	5/16/96	1257	5/31/96	71289	1	52-204-1100	EB11000 A.C.-DEVICE	EB-11000 AC DEVICE GENERATOR	$ 4,600.28	$ 7,003.62	$ 2,403.34	52%
53	5/16/96	1257	5/31/96	71289	8	57-204-8030	A-MPC2 CONTAINER	SORICE A-MPC2 W/SMOKED GLASS DOORS	$ 1,310.40	$ 2,800.00	$ 1,489.60	114%
53	5/16/96	1257	5/31/96	71289	4	57-204-8032	A-TKB2 BASE	SORICE A-TKB2 TOE KICK BASE	$ 107.80	$ 170.00	$ 62.20	58%
53	5/16/96	1257	5/31/96	71289	8	57-204-8034	A-300-SGD CONTAINER	SORICE A-300SGD W/SMOKED GLASS DOORS	$ 1,144.80	$ 2,400.00	$ 1,255.20	110%
53	5/16/96	1257	5/31/96	71289	4	57-204-8036	A-TKB BASE	SORICE A-TKB TOE KICK BASE		$ 132.00	#VALUE!	#VALUE!
54	5/31/96	71290	5/31/96	71290	1	45-816-2297	M3323LL/A 1710 DISPLAY ASSEMBLY	#1710 APPLEVISION 17" MONITOR	$ 1,956.00	$ 2,550.00	$ 594.00	30%
54	5/31/96	71290	5/31/96	71290	1	45-816-8550	M4341LL/A 8550/132 CPU BOARD	APPLE 8550/132 SERVER	$ 5,436.00	$ 6,255.00	$ 819.00	15%
54	5/31/96	71290	5/31/96	71290	1	45-816-2500	M4236LL/A 2500 PRINT HEAD ASSEMBLY	APPLE STYLEWRITER 2500	$ 338.00	$ 1,096.00	$ 758.00	224%
54	5/31/96	71290	5/31/96	71290	1	45-816-3828	M3828LL/A 5300/117 CPU BOARD	APPLE POWERBOOK 5300CE/117	$ 3,830.00	$ 6,231.85	$ 2,401.85	63%
55	6/4/96	1240	6/27/96	71916	3	54-155-1503	OPTICAL DEVICE	OLYMPUS STYLUS CAMERA	$ 236.25	$ 329.85	$ 93.60	40%
55	6/4/96	1240	6/27/96	71916	2	59-204-8436	PS-84360A RF DISH	RCA PROSCAN PS-84360A DSS SATELLITE RECEIVER	$ 1,493.60	$ 1,898.00	$ 404.20	27%
55	6/4/96	1240	6/27/96	71916	2	59-208-8801	SAT-B1 RF RECEIVER MODULE	SAT-B1 SONY DSS RECEIVER	$ 1,043.16	$ 1,303.90	$ 260.74	25%
55	6/4/96	1240	6/27/96	71916	1	53-204-2315	231596 PACKAGE	231596 TRAILERING PACKAGE	$ 10,854.94	$ 13,838.68	$ 2,983.74	27%
56	6/13/96	935	6/27/96	71917	3	59-280-1000	XG-E1000U LCD	XG-E1000U SHARP LCD VIDEO PR SERIAL #L603313882 L603313950, L603313897 SERIAL NUMBERS: 603313882 603313897 603313950	$ 16,500.00	$ 26,850.00	$ 10,350.00	63%

179a

EXHIBIT NUMBER	INVOICE DATE (DEA COPY)	INVOICE # (DEA COPY)	INVOICE DATE (RITZ COPY)	INVOICE # (RITZ COPY)	QUANTITY	STOCK NUMBER	DESCRIPTION ON INVOICE SENT TO DEA	DESCRIPTION ON INTERNAL RITZ DOCUMENTS	COST TO RITZ	INVOICED TO DEA	PROFIT	GROSS PROFIT %
56	6/13/96	935	6/27/96	71917	1	52-239-0075	RXDT-75 ELECTRONIC BOX	RX-DT75 PANASONIC BOOM BOX	$ 340.00	$ 425.00	$ 85.00	25%
56	6/13/96	935	6/27/96	71917	1	45-204-5168	XPS-P166S DATA DEVICE	DELL DIMENSION XPS P166S MINI TOWER COMPUTER W/32MB SDRAM & IMAGINE 128-BIT VID ACC CARD	$ 4,730.10	$ 5,462.63	$ 732.53	15%
57	7/9/96	1111	7/10/96	72139	3	52-204-0510	PR OS-10 AUDIO DEVICE	NILES OS-10 (BLK) SPEAKERS (PAIR)	$ 683.70	$ 1,013.70	$ 330.00	48%
57	7/9/96	1111	7/10/96	72139	2	52-204-5745	RF DEVICES	BEL 745 ST IP RADAR DETECTOR	$ 379.98	$ 539.90	$ 159.92	42%
57	7/9/96	1111	7/10/96	72139	1	52-204-6032	MZAM-6226737 HARDWARE	MZAM-6226737 HARDWARE LAWNMOWER	$ 798.00	$ 997.50	$ 199.50	25%
57	7/9/96	1111	7/10/96	72139	1	52-204-6034	MZAM-6226785 HARDWARE	MZAM-6226785 HARDWARE LAWNMOWER	$ 798.00	$ 997.50	$ 199.50	25%
58	7/26/96	930	7/31/96	72603	1	52-204-7002	PDF-109 CHANGER	PIONEER ELITE PDF-109 100-DISC CD CHANGER	$ 700.00	$ 950.00	$ 250.00	36%
59	7/31/96	157	8/15/96	72855	4	52-204-6030	A-MPC2 CONTAINER	SORICE A-MPC2 W/SMOKED GLASS DOORS	$ 655.20	$ 1,400.00	$ 744.80	114%
59	7/31/96	157	8/15/96	72855	2	57-204-6032	A-TKB2 BASE UNIT	SORICE A-TKB2 TOE KICK BASE	$ 53.90	$ 85.00	$ 31.10	58%
59	7/31/96	157	8/15/96	72855	4	57-204-5034	A-300SGD CONTAINER	SORICE A-300SGD W/SMOKED GLASS DOORS	$ 572.40	$ 1,200.00	$ 627.60	110%
59	7/31/96	157	8/15/96	72855	2	57-204-6036	A-TKB BASE UNIT	SORICE A-TKB TOE KICK BASE	$ 42.90	$ 66.00	$ 23.10	54%
59	7/31/96	157	8/15/96	72855	6	57-204-5035	A-MPC2-EWS SHELF	SORICE A-MPC2 -EWS EXTRA WOOD SHELF	$ 90.00	$ 180.00	$ 90.00	100%
61	9/6/96	946	9/13/96	73509	4	59-280-1100	XG-E1100 LCD PANEL	XG-E1100U SHARP LCD DATA/VIDEO PROJECTOR SERIAL NUMBERS: 608311332 608311619 608311620 608311635 SERIAL #608311619 608311620 608311332 608311635	$ 22,000.00	$ 35,980.00	$ 13,980.00	64%
62	9/18/96	314	9/19/96	73657	1	52-204-5255	KRC-902 RECEIVER MODULE	KENWOOD KRC-902 CAR STEREO	$ 309.00	$ 442.00	$ 133.00	43%
62	9/18/96	314	9/19/96	73657	1	52-204-5256	KDC-C803 CD READER	KENWOOD KDC-C803 CAR CD PLAYER	$ 305.00	$ 440.00	$ 135.00	44%
62	9/18/96	314	9/19/96	73657	10	59-280-0037	XV-H37U LCD PANEL	XV-H37U SHARP LCD VIDEO PROJ SERIAL NUMBERS: 613247 613250 613322 613348 613645 613647 613648 613652 613655 613670	$ 26,000.00	$ 34,000.00	$ 8,000.00	31%
63	9/26/96	353	9/27/96	73932	1	52-204-5255	KRC-902 RECEIVER MODULE	KENWOOD KRC-902 CAR STEREO	$ 309.00	$ 442.00	$ 133.00	43%
63	9/26/96	353	9/27/96	73932	2	52-204-5855	855 STI MODULE	BEL 855 STI RADAR DETECTOR	$ 448.00	$ 627.20	$ 179.20	40%
63	9/26/96	353	9/27/96	73932	2	69-139-6000	DC-50 DIGITAL MODULE	DC-50 KODAK DIGITAL CAMERA	$ 1,622.58	$ 2,190.00	$ 567.42	35%
63	9/26/96	353	9/27/96	73932	6	52-204-5259	KC-Z1 CONTROLLER	KENWOOD KC-Z1 THX CONTROLLER W/TOUCH SCREEN	$ 15,600.00	$ 18,600.00	$ 3,000.00	19%
63	9/26/96	353	9/27/96	73932	6	52-204-5260	KM-Z1 AMPLIFIER MOD	KENWOOD KM-Z1 THX 6-CHANNEL AMPLIFIER	$ 6,720.00	$ 7,800.00	$ 1,080.00	16%

EXHIBIT NUMBER	INVOICE DATE (DEA COPY)	INVOICE # (DEA COPY)	INVOICE DATE (RITZ COPY)	INVOICE # (RITZ COPY)	QUANTITY	STOCK NUMBER	DESCRIPTION ON INVOICE SENT TO DEA	DESCRIPTION ON INTERNAL RITZ DOCUMENTS	COST TO RITZ	INVOICED TO DEA	PROFIT	GROSS PROFIT %
63	9/26/96	353	9/27/96	73932	2	52-204-6056	DEH 55-DH RECEIVER MODULE	PIONEER DEH-55DH CAR STEREO	$ 798.00	$ 1,098.00	$ 300.00	38%
63	9/26/96	353	9/27/96	73932	4	59-204-7000	CLD-99 CD READER	PIONEER ELITE CLD-99 LASER DISC PLAYER	$ 7,680.00	$ 9,216.00	$ 1,536.00	20%
64	10/22/96	1208	10/23/96	74560	2	59-280-1000	XG-E1000U LCD PANEL	XG-E1000U SHARP LCD VIDEO PR SERIAL # 603315725 #512312875	$ 11,000.00	$ 15,000.00	$ 4,000.00	36%
64	10/22/96	1208	10/23/96	74560	2	59-280-1100	XG-E1100U LCD PANEL	XG-E1100U SHARP LCD DATA/VIDEO PROJECTOR SERIAL #609312323 #609312065	$ 11,000.00	$ 17,990.00	$ 6,990.00	64%
65	11/6/96	1152	10/23/96	74561	15	59-280-0037	XV-H37UP SHARP LCD PANEL	XV-H37U SHARP LCD VIDEO PROJ SERIAL NUMBERS: 603314170, 612691, 613351, 613597, 613605, 613641, 613643, 613650, 613653, 613661, 613663, 613668,	$ 39,000.00	$ 49,125.00	$ 10,125.00	26%
66	12/27/96	1227	1/2/97	75802	15	59-280-0037	XV-H37UP SHARP LCD PANEL	XV-H37U SHARP LCD VIDEO PROJ SERIAL NUMBERS: 616271 616272 616274 616275 616276 616277 616278 616280 616281 616282 616283 616284 616285 616286 616287	$ 39,000.00	$ 49,125.00	$ 10,125.00	26%
67	1/7/97	1138	1/7/97	75863	2	59-204-5999	RCA DT-999 ANTENNA	RCA DT-999 DSS DISH TRAVEL KIT WITH CASE	$ 333.60	$ 258.00	$ (75.60)	-23%
67	1/7/97	1138	1/7/97	75863	1	45-204-5601	MAT960A1 INTER. UNIT	PHILIPS MAGNAVOX MAT960A1 WEB-TV RECEIVER	$ 329.90	$ 449.95	$ 120.05	36%
67	1/7/97	1138	1/7/97	75863	1	45-204-5600	MWK100BK KEYBOARD	PHILIPS MAGNAVOX MWK100BK WEB-TV WIRELESS KEYBOARD	$ 69.99	$ 110.00	$ 40.01	57%
68	1/15/97	226	1/15/97	75987	10	59-204-7050	DVL-90 CD ROM DEVICE	PIONEER ELITE DVL-90 MULTI-DISC DVD PLAYER	$ 14,000.00	$ 18,990.00	$ 4,990.00	36%
68	1/15/97	226	1/15/97	75987	8	59-280-0037	XG-H37U LCD PANEL	XV-H37U SHARP LCD VIDEO PROJECTOR SERIAL NUMBERS: 616288 616289 616290 616291 616292 616293 616294 616297	$ 20,800.00	$ 26,200.00	$ 5,400.00	26%
69	2/20/97	416	2/20/97	76619	2	57-204-5034	SORICE A-300SGD CABINET	SORICE A-300SGD W/SMOKED GLASS DOORS	$ 286.20	$ 600.00	$ 313.80	110%
69	2/20/97	416	2/20/97	76619	1	57-204-5039	SORICE A-150BGD CABINET	SORICE A-150 BLACK W/ SMOKE GLASS DOORS	$ 94.00	$ 149.00	$ 55.00	59%
69	2/20/97	416	2/20/97	76619	1	57-204-5036	SORICE A-TKB BASE	SORICE A-TKB TOE KICK BASE	$ 21.45	$ 33.00	$ 11.55	54%
69	2/20/97	416	2/20/97	76619	2	57-204-5030	SORICE A-MPC2 COVER	SORICE A-MPC2 W/SMOKED GLASS DOORS	$ 327.60	$ 700.00	$ 372.40	114%
69	2/20/97	416	2/20/97	76619	1	58-204-5032	SORICE A-TKB2 BASE	SORICE A-TKB2 TOE KICK BASE	$ 26.95	$ 42.50	$ 15.55	58%
69	2/20/97	416	2/20/97	76619	1	45-208-5001	SONY DSC-F1 DIGITAL DEVICE	DSC-F1 SONY DIGITAL STL CAMERA	$ 776.32	$ 969.00	$ 192.68	25%
69	2/20/97	416	2/20/97	76619	1	52-239-5600	PANASONIC CX-DPFM601 6-DISC CHGR	CX-DPFM601 PANASONIC 6 DISC CAR CD PLAYER W/MODULATOR	$ 249.90	$ 376.00	$ 126.10	50%

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SUMMARY OF RITZ SALES TO DEA
(1993-1997)

EXHIBIT NUMBER	INVOICE DATE (DEA COPY)	INVOICE # (DEA COPY)	INVOICE DATE (RITZ COPY)	INVOICE # (RITZ COPY)	QUANTITY	STOCK NUMBER	DESCRIPTION ON INVOICE SENT TO DEA	DESCRIPTION ON INTERNAL RITZ DOCUMENTS	COST TO RITZ	INVOICED TO DEA	PROFIT	GROSS PROFIT %
69	2/20/97	416	2/20/97	76619	1	59-239-2011	PANASONIC CT20G11CDD MONITOR	CT-20G11 PANASONIC 20" MON	$ 216.00	$ 316.00	$ 100.00	46%
69	2/20/97	416	2/20/97	76619	1	59-204-5322	ELMO 1322N MONITOR	ELMO 1322N 13" COLOR CCTV MO	$ 256.25	$ 384.0	127.75	50%
69	2/20/97	416	2/20/97	76619	1	59-239-0990	PANASONIC TR-990C MONITOR	TR-990C PANASONIC 9" B/W MON	$ 115.00	$ 189.00	$ 74.00	64%
69	2/20/97	416	2/20/97	76619	1	52-204-3001	HARDWARE	COLEMAN POWER SPORT HARDWARE	$ 9,531.62	$ 12,350.00	$ 2,818.38	30%
70	3/27/97	108	3/28/97	77359	1	59-502-5718	HSU770 DEVICE	HS-U770 MITSUBISHI VHS VCR	$ 694.00	$ 799.00	$ 105.00	15%
70	3/27/97	108	3/28/97	77359	3	59-239-0910	CT-9R10 AC/DC	CT-9R10 PANASONIC 9" TV (WHITE)	$ 606.00	$ 839.95	$ 233.95	39%
70	3/27/97	108	3/28/97	77359	3	59-239-2030	CT-20G32 RECEIVER	CT-20G32 PANASONIC 20" STEREO	$ 786.00	$ 1,109.85	$ 323.85	41%
70	3/27/97	108	3/28/97	77359	3	59-239-2734	CT-27SF34 RECEIVER	CT-27SF34 PANASONIC 27" SUPERFLAT W/2-TUNER P-I-P	$ 1,575.00	$ 2,699.85	$ 1,124.85	71%
70	3/27/97	108	3/28/97	77359	1	59-239-3144	CT-36XF54 31" GAOO	CT-31XF44 PANASONIC 31" TV W/ STARSIGHT & 2 TUNER P-I-P	$ 1,020.00	$ 1,799.95	$ 779.95	76%
70	3/27/97	108	3/28/97	77359	1	59-239-3654	CT-36XF54 36" GAOO	CT-36XF54 PANASONIC 36" TV W/ STARSIGHT AND 2-TUNER P-I-P	$ 1,428.00	$ 2,399.00	$ 971.00	68%
70	3/27/97	108	3/28/97	77359	1	52-239-0810	SA-TX50 MASTER REFERENCE	SA-TXR0 MASTER REFERENCE THX RECEIVER	$ 650.00	$ 910.00	$ 260.00	40%
70	3/27/97	108	3/28/97	77359	1	52-239-5300	SH-AC300 DECODER	SH-AC300 TECHNICS AC-300 SURROUND SOUND PROCESSOR	$ 160.00	$ 299.95	$ 139.95	87%
70	3/27/97	108	3/28/97	77359	1	52-239-5050	SB-TX50 THX SYSTEM	SB-TX50 TECHNICS MASTER REFE SERIES SPEAKER SYSTEM	$ 1,400.00	$ 2,700.00	$ 1,300.00	93%
70	3/27/97	108	3/28/97	77359	2	59-280-9096	XV-896U LCD DEVICE	XV-896U SHARP LCD VIDEO PROJ W/ DVD INPUT	$ 9,130.00	$ 14,990.00	$ 5,860.00	64%
71	4/18/97	1134	4/18/97	77779	2	59-280-0348	SHARP 550	VL-H550UP SHARP HI-8 VIEWCAMERA STEREO 4-HD COLOR LCD FINDER	$ 1,979.90	$ 2,474.90	$ 495.00	25%
71	4/18/97	1134	4/18/97	77779	6	57-204-5034	SORICE A-300SGD CABINET	SORICE A-300SGD W/SMOKED GLASS DOORS	$ 858.60	$ 1,800.00	$ 941.40	110%
71	4/18/97	1134	4/18/97	77779	3	57-204-5036	SORICE A-TKB BASE	SORICE A-TKB TOE KICK BASE	$ 64.35	$ 99.00	$ 34.65	54%
71	4/18/97	1134	4/18/97	77779	4	57-204-5030	SORICE A-MPC2 COVER	SORICE A-MPC2 W/SMOKED GLASS DOORS	$ 655.20	$ 1,400.00	$ 744.80	114%
71	4/18/97	1134	4/18/97	77779	2	57-204-5032	SORICE A-TKB2 BASE	SORICE A-TKB2 TOE KICK BASE	$ 53.90	$ 85.00	$ 31.10	58%
71	4/18/97	1134	4/18/97	77779	2	57-204-5039	SORICE A-150SGD CABINET	SORICE A-150 BLACK W/ SMOKE GLASS DOORS	$ 188 [illegible]	$ 298.00	$ 110.00	59%
71	4/18/97	1134	4/18/97	77779	3	59-239-0077	PANASONIC RX-ED77	RX-ED77 PANASONIC AM/FM/CD PLATINUM COBRA STYLE PORTABLE STEREO	$ 630.00	$ 1,199.85	$ 569.85	90%
71	4/18/97	1134	4/18/97	77779	8	59-206-7001	SONY DVPS-7000S/B READER	DVPS-7000S/B SONY DVD PLAYER	$ 6,254.08	$ 7,820.00	$ 1,565.92	25%
71	4/18/97	1134	4/18/97	77779	1	52-204-5635	PIONEER DEH-635 DIGI DEVICE	PIONEER DEH-635 CAR STEREO	$ 303.00	$ 405.00	$ 102.00	34%

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EXHIBIT NUMBER	INVOICE DATE (DEA COPY)	INVOICE # (DEA COPY)	INVOICE DATE (RITZ COPY)	INVOICE # (RITZ COPY)	QUANTITY	STOCK NUMBER	DESCRIPTION ON INVOICE SENT TO DEA	DESCRIPTION ON INTERNAL RITZ DOCUMENTS	COST TO RITZ	INVOICED TO DEA	PROFIT	GROSS PROFIT %
71	4/18/97	1134	4/18/97	77779	1	54-139-0227	KODAK DC-120 DIGITAL DEVICE	DC-120 KODAK DIGITAL CAMERA	$ 861.00	$ 1,061.00	$ 200.00	23%
72	6/13/97	1101	6/23/97	79033	1	52-498-0059	MOTOROLA MICROTAC	MOTOROLA MICROTAC CELL PHONE	$ 270.90	$ 370.00	$ 99.10	37%
72	6/13/97	1101	6/23/97	79033	2	59-206-5101	SONY DKC ID1 DIGITAL DEVICE	DKC-ID1 SONY DIGITAL STILL CAM	$ 2,902.00	$ 3,902.00	$ 1,000.00	34%
73	7/18/97	1128	7/18/97	79654	3	52-204-5060	WAVE ELECTRONIC BOX	BOSE WAVE STEREO RADIO	$ 1,049.85	$ 1,497.00	$ 447.15	43%
73	7/18/97	1128	7/18/97	79654	1	59-280-1201	1200 LCD DEVICE	XG-E1200U SHARP S-VGA PROJECTOR SERIAL NUMBERS: 702311543	$ 5,500.00	$ 7,995.00	$ 2,495.00	45%
75	8/29/97	415	8/29/97	80449	2	52-239-2001	MICROWAVE NNS787 SWITCH	NN-S787BA PANASONIC MICROWAVE OVEN (BLACK)	$ 288.00	$ 403.20	$ 115.20	40%
75	8/29/97	415	8/29/97	80449	10	59-204-8888	MAESTRO ELEC BOX	ADVENT ELECTRONICS MAESTRO DESCRAMBLE DEVICE	$ 2,750.00	$ 3,750.00	$ 1,000.00	36%
75	8/29/97	415	8/29/97	80449	2	59-280-1201	1200U LCD PANEL	XG-E1200U SHARP S-VGA PROJECTOR SERIAL NUMBERS: 707313160 707313213	$ 11,000.00	$ 14,990.00	$ 3,990.00	36%
76	8/29/97	507	8/29/97	80454	1	59-280-1201	1200U PANEL	XG-E1200U SHARP S-VGA PROJECTOR SERIAL #707313168	$ 5,500.00	$ 7,495.00	$ 1,995.00	36%
76	8/29/97	507	8/29/97	80454	1	52-204-9650	#29650 TRACK MILL	NORDIC TRACK #29650 POWERTREAD TREADMILL	$ 899.90	$ 1,299.95	$ 400.05	44%
76	8/29/97	507	8/29/97	80454	1	52-239-8360	PINNACLE PLUS	PINNACLE PLUS DARK TWILIGHT JACUZZI WITH INSTALL AND DECK	$ 8,360.00	$ 11,360.00	$ 3,000.00	36%
76	8/29/97	507	8/29/97	80454	1	52-239-6126	#561263 PANASONIC BOARD	PANASONIC MASSAGE CHAIR	$ 1,999.95	$ 3,999.00	$ 1,999.05	100%
77	9/12/97	335	9/12/97	80693	1	52-204-5298	#29851 NORD SUPPORT TRACK	NORDIC TRACK #29851 TREADMILL	$ 1,199.90	$ 2,099.95	$ 900.05	75%
77	9/12/97	335	9/12/97	80693	2	52-239-5656	NI-656E PANA SOLDER IRON	NI-656E PANASONIC IRON	$ 67.50	$ 139.90	$ 72.40	107%
77	9/12/97	335	9/12/97	80693	6	52-239-6091	KX-TM90B PANA DIGITAL DEVICE	KX-TM90B PANASONIC DIGITAL ANSWERING MACHINE	$ 384.00	$ 629.70	$ 245.70	64%
77	9/12/97	335	9/12/97	80693	2	59-239-3654	CT36 PANA VIEWER	CT-36XF54 PANASONIC 36" TV W/ STARSIGHT AND 2-TUNER P-I-P	$ 2,856.00	$ 4,798.00	$ 1,942.00	68%
77	9/12/97	335	9/12/97	80693	1	52-239-7395	MC-V395 PANA VAC	MC-V7395 PANASONIC VACUUM CLEANER	$ 170.85	$ 299.95	$ 129.10	76%
77	9/12/97	335	9/12/97	80693	10	59-204-5399	GILRON NOVA NVSA ELEC. DEVICE	GILRON NOVA VISION CD-NVSA DESCRAMBLE DEVICE	$ 2,890.00	$ 3,990.00	$ 1,100.00	38%
77	9/12/97	335	9/12/97	80693	1	52-239-6126	#561263 PANA SUPPORT TRACK	PANASONIC MASSAGE CHAIR	$ 1,999.95	$ 3,999.00	$ 1,999.05	100%
78	9/26/97	445	9/30/97	81077	6	57-204-5034	SORICE A-300 CABINET	SORICE A-300GD W/SMOKED GLASS DOORS	$ 858.60	$ 1,800.00	$ 941.40	110%
78	9/26/97	445	9/30/97	81077	15	57-204-5036	SORICE A-TKB	SORICE A-TKB TOE KICK BASE	$ 321.75	$ 495.00	$ 173.25	54%
78	9/26/97	445	9/30/97	81077	6	57-204-5030	SORICE MPC-2 CABINET	SORICE A-MPC2 W/SMOKED GLASS DOORS	$ 982.80	$ 2,100.00	$ 1,117.20	114%
78	9/26/97	445	9/30/97	81077	3	57-204-5032	SORICE A-TKB2	SORICE A-TKB2 TOE KICK BASE	$ 80.85	$ 127.50	$ 46.65	58%

BEST AVAILABLE COPY

EXHIBIT NUMBER	INVOICE DATE (DEA COPY)	INVOICE # (DEA COPY)	INVOICE DATE (RITZ COPY)	INVOICE # (RITZ COPY)	QUANTITY	STOCK NUMBER	DESCRIPTION ON INVOICE SENT TO DEA	DESCRIPTION ON INTERNAL RITZ DOCUMENTS	COST TO RITZ	INVOICED TO DEA	PROFIT	GROSS PROFIT %
78	9/26/97	445	9/30/97	81077	15	57-204-5039	SORICE A-150 CABINET	SORICE A-150 BLACK W/ SMOKE GLASS DOORS	$ 1,410.00	$ 2,235.00	$ 825.00	59%
78	9/26/97	445	9/30/97	81077	24	57-204-5040	SORICE STACKING HARDWARE	SORICE STACKING HARDWARE KIT	$ -	$ 144.00	$ 144.00	
78	9/26/97	445	9/30/97	81077	10	59-204-5299	GILRON OCD-SABB DESCRAMBLE	OCD-SABB SCI-ATLANTA DESCRAMBLE DEVICE	$ 2,980.00	$ 4,000.00	$ 1,020.00	34%
78	9/26/97	445	9/30/97	81077	1	52-204-3073	#30730 N-TRACK RAIL	#30730 N-TRACK RAIL	$ 999.95	$ 1,995.00	$ 995.05	100%
78	9/26/97	445	9/30/97	81077	4	52-204-6285	#62856H HAMMER ROB	62856H HAMMER ROBE	$ 399.80	$ 799.80	$ 400.00	100%
78	9/26/97	445	9/30/97	81077	4	52-204-6258	#62868H HAMMER SHEET	62858H HAMMER SHEET	$ 199.80	$ 399.80	$ 200.00	100%
78	9/26/97	445	9/30/97	81077		52-204-5280	#52804H HAMMER TOW	52804H HAMMER TOWEL (2-SET)	$ 99.90	$ 199.90	$ 100.00	100%
78	9/26/97	445	9/30/97	81077	1	59-208-5007	MVC-FD-7 MAVICA CAM	MVC-FD7 SONY MAVICA DIGITAL CAMERA	$ 639.00	$ 899.95	$ 260.95	41%
								TOTAL	$ 688,596.88	$ 926,723.03	$ 238,126.15	35%

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SUMMARY OF RITZ SALES TO DEA
(1993-1997)

ATTACHMENT H

SUMMARY OF RITZ SALES OF MOVIE AND MUSIC DISCS

EXHIBIT NUMBER	INVOICE DATE (DEA COPY)	INVOICE # (DEA COPY)	INVOICE DATE (RITZ COPY)	INVOICE # (RITZ COPY)	QUANTITY	STOCK NUMBER	DESCRIPTION ON INVOICE SENT TO DEA	DESCRIPTION ON INTERNAL RITZ DOCUMENTS	INVOICED TO DEA
18	2/14/94	42286	2/14/94	52863	1	59-204-9005	PBM80 MOUNTING KIT; APM2448 TUBE ADAPTER; 120A12B SCREEN UNIT; DV RF GENERATOR; DV MONITOR UNIT; TBA SUPPORT ASSEMBLY	LASER DISCS(ASSORTED TITLES)	$ 24,745.65
25	8/15/94	57121	8/15/94	57121	1	59-204-5021	12" READ ONLY MEMORY DISC (182) ONE LOT	LOT 12" READ ONLY MEMORY DISC (182) LASER DISCS VARIOUS TITLES	$ 24,887.50
26	9/29/94	451111	10/12/94	58623	1	59-204-5021	12" READ ONLY	MISCELLANEOUS MDSE 12" READ ONLY LASER DISC (1-LOT)	$ 9,623.00
48	11/22/95	1119	11/28/95	67273	1	182	CD-ROM(1-LOT)	MISCELLANEOUS MDSE MUSIC CD'S CD-ROM(1-LOT VARIOUS TITLES)	$ 8,112.78
49	1/17/96	156	1/17/96	68066	1	182	CD/ROM (1-LOT)	MISCELLANEOUS MDSE MUSIC CD'S/LASERDISCS CD/ROM (1-LOT)	$ 1,974.34
50	3/15/96	1140MAR	3/28/96	69700	1	182	CD ROM'S (ONE LOT)	MISCELLANEOUS MDSE CD ROM'S (1-LOT) VARIOUS TITLES MUSIC CD'S & LASERDISCS	$ 47,852.21
60	8/15/96	1117	8/26/96	73005	1	182	CD ROM'S (ONE LOT)	MISCELLANEOUS MDSE CD-ROMS (1-LOT) MUSIC CD'S AND LASERDISCS VARIOUS TITLES	$ 47,865.43
70	3/27/97	108	3/28/97	77359	1	182	LOT CD ROM'S	CD/LASERS/VIDEOS ONE LOT CD ROM/LASERDISCS DVD DISCS CD'S & VHS TAPES	$ 18,764.37
73	7/18/97	1128	7/18/97	79654	1	69	183 CD ROM LOT	CD/LASERS/VIDEOS	$ 15,276.42
75	8/29/97	415	8/29/97	80449	1	69	CD ROM PACKAGE	CD/LASERS/VIDEOS 182 CD ROM PACKAGE ASST CD/LASERDISCS ETC	$ 2,168.47
77	9/12/97	335	9/12/97	80693	1	69	CD ROM PACKAGE	CD/LASERS/VIDEOS ONE LOT	$ 7,985.43
78	9/26/97	445	9/30/97	81077	1	69	182 ROM KIT	CD/LASERS/VIDEOS 182 ROM KIT	$ 8,055.44
								TOTAL	$ 217,311.04
								APPROXIMATE TOTAL COST TO RITZ	$ 163,264.59
	TOTAL NUMBER OF MUSIC CDs					3,224			
	TOTAL NUMBER OF MOVIE DISCS AND DVDs					1,892		APPROXIMATE GROSS PROFIT	$ 54,046.45
								APPOXIMATE GROSS PROFIT %	33%

GOVERNMENT EXHIBIT 161

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

UNITED STATES OF AMERICA

v.

ROBERT F. DVORAK

Defendant

Criminal No. 99-412-A

FILED APRIL 21, 2000
Clerk, U.S. District Court
Alexandria, Virginia

POSITION OF DEFENDANT ROBERT F. DVORAK WITH RESPECT TO SENTENCING FACTORS

Comes now defendant Robert F. Dvorak, through undersigned counsel, and submits the following memorandum in aid of sentencing. Defendant objects to the government's calculation of the loss amount in this case and to the government's proposed enhancement for obstruction of justice, which lacks a factual basis. Defendant also requests that the Court depart downward in calculating the sentence because of his extraordinary physical impairment, as described in more detail in this memorandum and the attached affidavit and materials. We also propose an appropriate sentence, and address issues of restitution and bail pending appeal.

Mr. Dvorak's Background

Born and raised in the Anacostia area of Washington, Mr. Dvorak attended a local high school and began to work immediately after his graduation. He worked initially as a department store photographer at several local department stores, and then took a job with Ritz Camera Centers, Inc. There he worked in the Company's Commercial sales division until the company decided to leave that line of business. Mr. Dvorak and Gary Lunsford then purchased the Division from Ritz Camera Centers, Inc. and established Ritz Audio Visual Associates, Inc. ("Ritz").

Having taken the risky step of buying this small business, Messrs. Lunsford and Dvorak set out to build a stable and successful venture. Ritz sold a variety of equipment, most of it in the audio-visual area, to a variety of customers. The single largest customer, the Seventh-day Adventist Church, accounted for a substantial portion of their revenue. Ritz also sells to more than 70 different government agencies and a variety of commercial enterprises. It sells off-the-shelf commercial hardware and customized installations and provides the services and training necessary to operate this kind of equipment. Ritz also rents audio-visual equipment. They built their business from a division that had just over $3 million in sales in 1987 to a business that expects to make more than $9 million in sales this year.

During his time at Ritz, Mr. Dvorak has impressed many of the people he has met, among them his customers, suppliers, and employees. Two of his suppliers testified at trial to his good character. Many of the others who know him submitted letters to the Court, which we have submitted to the writer of the Pre-Sentence Report. Brother John Hollywood, a client of more than twenty years from the Jesuit community at Georgetown University, has written of Mr. Dvorak's integrity and honesty, and his overwhelming concern for the welfare of his clients. Others write of how he has been fair and honest to

his customers. Other friends have written of his kindness and generosity toward others.

Mr. Dvorak has accomplished all this in life despite his own severe physical handicap. He was born with kyphoscoliosis, a spinal disease that causes curvature of the spine. His parents could not spend the money to enable him to have a corrective operation when he was a child. As a result, his condition has slowly and progressively worsened over time. Short of stature to begin with, Mr. Dvorak gives the impression of being even shorter as he is unable to stand up straight. He is unable to lift objects that weigh more than a few pounds. As we explain in greater detail *infra*, Mr. Dvorak's disease has made it increasingly difficult for him to breathe because the curvature of his spine has compressed and distorted his lungs and other organs.

Despite this handicap, Mr. Dvorak has worked full-time at Ritz and helped to build it as a business. His handicap imposes certain limitations on the way he has conducted business, by limiting his ability to travel or to lift the kind of equipment he sells. In more recent months, his disease has forced him to use a portable breathing apparatus to be able to maintain his breath.[1]

Although Ritz had done business with various parts of the Justice Department before it began to deal with Burchell, Ritz had virtually no business with DEA before that time. Everyone at Ritz, including Mr. Dvorak, believed that they were conducting legitimate business with DEA and was shocked to learn that Burchell had been stealing from the agency for many years. Mr. Dvorak believed that Burchell was conducting legitimate business on behalf of an agency that had a variety of needs for unusual equipment to conduct

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[1] Mr. Dvorak will appear at sentencing with an ambulatory oxygen device prescribed by his doctor. He has had to use this apparatus for the last two months as directed by Dr. Elson.

unusual operations. Mr. Dvorak believed that these sales were for DEA's business.

Having learned through this case what Burchell was doing with the items that Ritz sold to DEA, Mr. Dvorak now knows that Burchell was stealing from the agency and had been stealing from it for many years. Mr. Dvorak was fooled by Burchell, intimidated by his demeanor, deterred from further inquiry by Burchell's insistence that Ritz need not know DEA's purposes, deceived by his insistence that DEA needed help from Ritz, and fooled by the presence of regular agency paperwork to support the purchases.

Mr. Dvorak also was susceptible to Burchell's approach because Mr. Dvorak hoped that he too could help his country by assisting the DEA. Mr. Dvorak's oldest brother had a long and successful career in the CIA. Mr. Dvorak's other brother served in the Air Force for many years. His niece worked for the National Reconnaissance Office. His cousin worked for Naval Intelligence. Knowing that he could never serve in the military because of his physical condition, Mr. Dvorak hoped that he could assist the government by helping DEA.

Burchell cynically exploited Mr. Dvorak's naivete and his willingness to help the DEA. Burchell used Mr. Dvorak to support Burchell's own scheme to enrich himself and his DEA accomplices. Mr. Dvorak sold products to DEA and unknowingly become a part of a much larger conspiracy.

We suggest that the jury convicted Mr. Dvorak in heavy reliance on the theory of "willful blindness" or "conscious avoidance." The jury scrutinized Mr. Dvorak's actions with the certainty and knowledge that hindsight provides. It found that he had failed to ask enough questions and that he had failed to press Burchell to learn about the scheme that Burchell had created.

Mr. Dvorak was unaware of Burchell's illegal activities. Mr. Dvorak never intended his actions to harm anyone. He regrets that anything associated with his name or deeds could cause harm to the DEA as a result of selling to embezzling

DEA employees. Finally, Mr. Dvorak profoundly regrets that the DEA employee embezzlement scheme was not obvious to him at the time. We now turn to a discussion of Mr. Dvorak's sentence under the Federal Sentencing Guidelines ("Guidelines").

I. Loss Calculation

Section 2F1.1 of the Guidelines requires that the Court calculate the loss that the government sustained as a result of the offenses for which Mr. Dvorak was convicted. We suggest that the proper measure of this loss should not exceed $277,443.

The government's calculation of the loss amount exaggerates the amount properly attributable to Mr. Dvorak. Although the government originally contended that the proper loss amount exceeded $1.1 million, the government now concedes that the Court should disregard the amount of $121,045 in orders that pre-date February 1994. Government Sentencing Mem. at 10. The government pinpoints a critical date as the February 14, 1994 transaction that involved the ordering of laser discs. The government argues that Mr. Dvorak must have known by February 1994 that Burchell was "involved in fraudulent activity" *Id.* The government argues from that point that Mr. Dvorak therefore must be responsible for every single item that Burchell stole from February 1994 onwards.

The Guidelines do not provide for such a mechanical calculation of the loss attributable to Mr. Dvorak. Under Guideline § 2F1.1(b)(1), the Court must determine the amount of loss attributable specifically to Mr. Dvorak, following the valuation rules in the Commentary to § 2B1.1. USSG § 2F1.1, comment. (n.7). The rules under § 2B1.1, in turn, define the loss as "the value of the property taken, damaged, or destroyed." USSG § 2B1.1., comment. (n.2). But Mr. Dvorak did not take, damage or destroy any property. He provided property to Burchell, an employee of DEA. Mr. Dvorak

believed that by providing the property to Burchell, he was in fact providing the property to DEA.

Burchell's testimony made clear that he stole the property that Ritz had sold to DEA, or that he allowed others, such as Jean Burchell or Michael Hendrix, to steal the property. Under the Guidelines, then, the question becomes how much of Burchell's thefts should be attributable to Mr. Dvorak. The Guidelines provide that the court must determine the extent of Mr. Dvorak's responsibility for Relevant Conduct under § 1B1.3. That Section states explicitly that the "principles and limits of sentencing accountability under this guideline are not always the same as the principles and limits of criminal liability." USSG § 1B1.3 comment. (n.1). Mr. Dvorak's conviction under the conspiracy count of the indictment, in other words, does not necessarily mean that all of Burchell's thefts during the conspiracy should be attributed to Mr. Dvorak. The "focus is on the specific acts and omissions for which the defendant is to be held accountable in determining the applicable guideline range . . ." *Id.*[2] This Guideline provides that the defendant is responsible, in the case of "jointly undertaken criminal activity," for "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity." USSG § 1B1.3(a)(1)(B).

The government mistakenly argues that Mr. Dvorak is responsible for everything that Burchell did after the time he ordered laser discs from Ritz. The government also argues that the nature of certain other transactions - listed on page 11 of the government's sentencing memorandum - meant that Mr. Dvorak knew that all the transactions were fraudulent.

The government's argument fails because it proves too much. Proof that Ritz sold, for example, jet skis, proves

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[2] Even though the jury found Mr. Dvorak guilty of conspiracy, the verdict did not establish the loss amount. The jury was instructed that it could find Mr. Dvorak guilty even if it found no loss to the government.

nothing about whether it should have been obvious that it was wrong to sell video projectors, which DEA and other government agencies routinely order. The indictment alleged that Ritz conducted $1.4 million in fraudulent transactions with DEA. The government's evidence at trial, though, did not prove that allegation in the indictment. The government conceded at trial that some of the Ritz transactions were "legitimate" and argued that the evidence showed only $1.1 million in improper transactions. The government's calculation of the improper transactions relied principally on the testimony of Burchell, who identified the items that he had stolen.

Burchell's testimony, first of all, was not believable. An admitted thief, Burchell acknowledged that he prepared false documents to conceal his own theft and lied repeatedly to supervisors and others to protect himself. We have detailed the basis for this conclusion in our motion for a new trial, at pages 2-5, and will not repeat it here. Even Burchell did not claim that he told Mr. Dvorak that he was stealing the items.[3] Only Burchell's statements after the thefts identified which items he stole and which items he ordered for DEA.

The government's reliance on Burchell's *post hoc* admissions about the nature of his thefts undermines any claim that these thefts were *foreseeable* by Mr. Dvorak. Many of the items that Burchell ordered after February 1994 were the same items that he had ordered before 1994 - video projectors, cameras, televisions, computer monitors and the like. How was Mr. Dvorak to know which of these were for DEA and which were for Burchell to steal? Many of the items that Burchell stole were items that government agencies like the DEA routinely buy - audio visual storage furniture, video

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[3] Burchell did testify that he told Mr. Dvorak that he wanted the jet ski for his retirement home in Bracey. This testimony is implausible. If, as the government contends, Burchell and Mr. Dvorak were co-conspirators, why would they need to discuss what purpose Burchell had in ordering his equipment?

equipment and the like. The government cannot meet its burden merely because Burchell admitted after the thefts that he was stealing; Burchell's conduct is attributable to Mr. Dvorak only if Mr. Dvorak knew in advance that Burchell was stealing those items. The Court must assess this from Mr. Dvorak's perspective at the time of the criminal acts. As the First Circuit has held, a "reasonably foreseeable act" is an act that "a reasonable person who knew everything that the defendant knew at the time would have been able to know in advance with a fair degree of probability." *United States v. LaCroix*, 28 F.3d 223, 229 (1st Cir. 1994).

Mr. Dvorak could not have known in advance which of the items Burchell was stealing and which he was providing to DEA. The government's own confusion on these matters illustrates the point. The indictment originally charged $1.4 million of fraudulent purchases, but the government's proof at trial showed much less. The government admits that some of the purchases simply went to DEA and were therefore not fraudulent. The government did not even argue that some of the other purchases were fraudulent, despite the allegations in the indictment. Many of the items were standard purchases for DEA or other government agencies. In short, Mr. Dvorak lacked knowledge in advance with the "fair degree of probability" that reasonable forseeability requires.

Furthermore, it is arbitrary to have Mr. Dvorak's sentence depend on Burchell's after-the-fact admissions of thefts. The government essentially argues that Mr. Dvorak is responsible for anything that Burchell later admitted to doing, whether or not Mr. Dvorak knew any of the particulars at the time. This is unwarranted and goes far beyond any of the principles of the Guidelines.

We have calculated an estimate of the loss amount that might fairly be attributed to Mr. Dvorak. We calculated that amount by beginning with the amount of sales shown on Government Exhibits, 160 and 161, which totaled $1,144,034.03. We have subtracted the $121,045 that the government now concedes the Court should disregard. We

also have deducted $738,926 for the ordering of standard DEA items like computers, cameras, video projectors etc.

This yields the following calculation:

Total from Gov't exhibits 160 and 161	$ 1,144,034
Subtract: pre-Feb 94 items	$ 121,045
Subtract: standard items	$ 745,546
Maximum loss	$ 277,443

This figure provides a more accurate estimate of the loss.

II. Neither the Case Law Nor the Facts of This Case Support a Section 3C1.1 Enhancement for Obstruction of Justice

Both the Presentence Report ("PSR") and the government's sentencing memorandum conclude that a two-point enhancement of Mr. Dvorak's base offense level for alleged obstruction of justice under Guidelines § 3C1.1 is warranted. The PSR states that the enhancement is warranted because the defendant "denied his guilt under oath, contradicted testimony by Burchell found by the jury to be truthful, and he failed to fully disclose documents to the grand jury when instructed to do so." *See* PSR at 8. The government's sentencing memorandum claims that a Section 3C1.1 enhancement is appropriate because Mr. Dvorak obstructed the grand jury's investigation by failing to turn over a document found only in the DEA's files. Neither the case law nor the facts of this case, however, support such a recommendation.

On April 10, 2000, Mr. Dvorak, through his counsel, sent a detailed letter to the probation officer objecting to the obstruction of justice enhancement contained in the Presentence Report. A copy of that letter was also provided to the government. As evidenced by that letter and this memorandum, Mr. Dvorak strenuously and specifically objects to the proposed enhancement thus mandating that this Court require the Government to produce evidence at the sentencing hearing regarding the recommended enhancement.

See United States v. Holt, 969 F.2d 685, 688 (8th Cir. 1992). In addition, this Court must make specific findings regarding the allegations of obstruction of justice. Mere reliance on the PSR and the government's recommendations is not enough. *Id.*

An enhancement under Section 3C1.1 may be warranted "[i]f (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of an investigation, prosecution or sentencing of the instant offense of conviction, and (B) the obstructive conduct related (i) to the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense." USSG § 3C1.1. The enhancement is intended for a defendant who engages in conduct calculated to mislead or deceive authorities or those involved in judicial proceedings. *See United States v. Lange*, 918 F.2d 707, 709 (8th Cir. 1990)(citing USSG § 3C1.1, comment. (n.2)); *see also, United States v. Ashers*, 968 F.2d 411, 413 (4th Cir. 1992), *cert. denied*, 506 U.S. 1027 (1992)(citing *Lange*, 918 F.2d at 709).

Although the PSR suggests that this enhancement is warranted for Mr. Dvorak's alleged false testimony at trial and for his interference with the grand jury's investigation, the government has limited its argument to claims that Mr. Dvorak must have impeded the grand jury's investigation. The government theorizes that because one document out of several hundred was found in the DEA's files but not produced by Mr. Dvorak, steps must have been taken to destroy that document once Mr. Dvorak received a grand jury subpoena. The government, however, introduced no evidence that this document existed outside the DEA because no such document existed. In fact, Burchell himself testified that he forged documents while at the DEA. Feb. 7, 2000 Trial Tr. at 174. In addition, the DEA files contained nine purchase orders or invoices that had been altered from the copies of the

same paperwork that appeared in the Ritz files.[4] Thus it is far more likely that Burchell fabricated the document in the DEA files than Mr. Dvorak destroyed a document after receiving a grand jury subpoena.

The facts of this case place it outside the reach of case law supporting Section 3C1.1 enhancements. For instance, in *United States v. Sumler*, 96 F.3d 1440, 1996 WL 511483 (4th Cir. 1996)(unpublished opinion), one of the cases upon which the government relies, the Court specifically found that the defendant had created false records after receiving a grand jury subpoena thus warranting a two-level enhancement under Section 3C1.1. The trial record in this case, however, does not support the government's claim of obstruction because there is absolutely no conclusive evidence that Mr. Dvorak in anyway obstructed the investigation or prosecution of this case.

Similarly in *United States v. Upton*, 91 F.3d 677 (5th Cir. 1996), *cert. denied*, 520 U.S. 1228 (1997), the Fifth Circuit affirmed an obstruction enhancement where the defendant admitted that he had lied to the grand jury and failed to produce subpoenaed documents. The Court found that the sentencing court's acceptance of the defendant's own admissions of guilt were sufficiently reliable to form a basis for the enhancement. *See Upton*, 91 F.3d at 688. In the instant case, however, Mr. Dvorak vigorously disputes the allegations that he obstructed the government's case in anyway. Furthermore, the government's strongest witness with regard to this alleged obstruction is himself an admitted forger of documents and chronic liar. "For the requirements of due process to be met, the factual evidence relied upon must have some minimal indicium of reliability beyond mere allegation." *United States v. Hicks*, 948 F.2d 877 (4th Cir.

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[4] The testimony about Burchell's fabrication of documents is described in more detail in our Motion for a New Trial at pages 6-7.

1991). Such is not the case here; there simply is no foundation upon which to rest an obstruction enhancement.

In the present case, the government has assumed the most important facts - namely that the invoice in DEA files ever existed at Ritz and that Mr. Dvorak destroyed it after receiving the grand jury subpoena. But there is no independent evidence that the document ever existed in Ritz files, much less that it existed at the time the government served the grand jury subpoena. Furthermore, it would make no sense for Mr. Dvorak to have destroyed the invoice, that, under the government's theory, served to conceal the scheme, while simultaneously producing the document that revealed that Ritz had sold laser discs to the DEA. That is, Mr. Dvorak produced a document that was more incriminating than the one in the DEA files, and, under the government's theory, destroyed the document that concealed the scheme. The government's argument is illogical and should be rejected.

The alternative basis for enhancement, namely, Mr. Dvorak's supposed perjury, also should be rejected. The two-level increase, however, is far from automatic, particularly in instances where a defendant testifies on his own behalf. *See United States v. Dunnigan*, 507 U.S. 87, 95 (1993). "[N]ot every accused who testifies at trial and is convicted will incur an enhanced sentence under § 3C1.1." *Id.* The right to testify on one's own behalf in a criminal proceeding is made explicit by federal statute and it is also a right implicit in the Constitution. *See id.* at 96. Thus, the mere fact that in this case Mr. Dvorak "denied his guilt under oath" hardly supports a two-level enhancement under the sentencing guidelines. In fact, it is his right to do so. And while that right does not create a right to commit perjury where, as here, a defendant objects to sentence enhancement resulting from his trial testimony alone, a district court must review the evidence and make independent findings to justify the enhancement. *See id.*; *see also United States v. Holt*, 969 F.2d 685, 688 (8th Cir. 1992)(citing *United States v. Streeter*, 907 F.2d 781, 792 (1990)); *United States v. Austin*, 54 F.3d 394, 404 (7th Cir.

1995), *aff'd.*, 103 F.3d 606 (7th Cir. 1997)). "The enhancement may not be given simply because a defendant testifies on his own behalf and the jury disbelieves him." *Holt*, 969 F.2d at 688 (*citing United States v. Willis*, 940 F.2d 1136, 1140 (8th Cir. 1991), *cert. denied*, 507 U.S. 971 (1993)).

In the instant case, the jury could have credited Burchell's testimony where it conformed with that given by Mr. Dvorak's, and rejected the rest. Mr. Burchell readily admitted his willingness to lie with regard to his own criminal activity. There is nothing in the record to indicate that he did not fabricate his testimony so as to contradict that of Mr. Dvorak. The jury's guilty verdict is simply inconclusive in that regard. For instance, the jury may have concluded that Mr. Dvorak knew enough about Mr. Burchell's actions so that he acted with the requisite criminal knowledge, or that he was at least willfully blind to Burchell's criminal activity. "The requirement of sworn testimony, backed by punishment for perjury, is as much a protection for the accused as it is a threat. All testimony from third-party witnesses and the accused has greater value because of the witness's oath and the obligations and penalties attendant to it." *Dunnigan*, 507 U.S. at 97. Thus, even though there are contradictions between the testimony of Burchell and Mr. Dvorak, there is no indication as to what credit the jury gave to either. Given this ambiguity, the PSR's conclusory statement that Mr. Dvorak lied does not support a Section 3C1.1 enhancement. *See Holt*, 969 F.2d at 688 (suggesting sentencing courts not rely merely on guilty verdict when presented with allegations of false testimony). This is especially so given that even the government refused to rest its recommendation for a Section 3C1.1 enhancement on these arguments.

The Government has failed to meet its burden in establishing a foundation upon which to increase Mr. Dvorak's sentencing level under Section 3C1.1. The fact that Mr. Dvorak testified on his own behalf and the jury convicted him is not proof of obstruction. Nor is it proof of obstruction that Mr. Dvorak's testimony did not conform with that of the

Government's key witness, himself an admitted liar. Finally, the Government's unproven allegations of document destruction do not amount to sufficient proof that an obstruction enhancement is warranted. Mr. Dvorak simply did not obstruct justice and an enhancement for such is wholly unwarranted.

III. The Court Should Depart Downward because of Mr. Dvorak's Extraordinary Physical Impairment

After the jury returned its verdict in this case, Mr. Dvorak began to prepare himself for sentencing. Recognizing that his own physical health was imperfect, he made an appointment with Dr. R.H. Sandstrom, who had been his primary care doctor for many years.

Dr. Sandstrom conducted a routine physical examination of Mr. Dvorak. Dr. Sandstrom became quite concerned about the results and sent Mr. Dvorak to two specialists for further evaluation. One, Dr. Blake, is a specialist in osteopathic medicine; the other, Dr. Norton Elson, is a pulmonologist.

A. The Guidelines Permit a Downward Departure for an Extraordinary Physical Impairment

Although the Guidelines provide that "physical condition or appearance . . . is not relevant in deciding whether to depart from a Guidelines sentence," the Guidelines also provide that "an extraordinary physical impairment may be a reason to impose a sentence below the applicable Guidelines range." USSG § 5H1.4. The Guidelines provide an example: "in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment." *Id.* This is precisely such a case.

The Fourth Circuit has recognized the authority of the court to depart where incarceration would jeopardize the medical treatment of a severe medical condition. *United States v. Greenwood*, 928 F.2d 645, 646 (4th Cir. 1991). *See also United States v. Jones*, 18 F.3d 1145, 1149 (4th Cir. 1994) ("Where a defendant is unable, due to age and physical

condition, to endure a sentence, the Guidelines do permit a downward departure"). As the Second Circuit held in *United States v. Rioux*, 97 F.3d 648 (2nd Cir. 1996), extraordinary physical impairments "are ones that render the defendant 'seriously infirm.'" *Id. (quoting United States v. Altman*, 48 F.3d 96, 104 (2nd Cir. 1995)).

No particular disease or condition automatically qualifies a defendant for a downward departure.[5] Rather, the court must assess each case, weighing the evidence about the defendant's medical condition and the treatment required for the condition. If the court finds that the defendant's physical condition is exceptional, i.e. where the "factor is present to an exceptional degree or in some other way that makes the case different from the ordinary case where the factor is present," *United States v. Rybicki*, 96 F.3d 754, 758 (4th Cir. 1996) (*quoting Koon v. United States*, 116 S. Ct. 2035, 2045 (1996)), the Court may exercise its discretion to depart.

B. **Mr. Dvorak Has an Extraordinary Physical Impairment**

Mr. Dvorak suffers from kyphoscoliosis and other ailments. In layman's terms, Mr. Dvorak's spine curves both toward the back and toward the side. The disease bends his body to the side at an angle.[6] Mr. Dvorak, who was born with this condition, was not able to receive corrective surgery as a

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[5] Compare *United Stares v. Hammond*, 37 F. Supp. 2d 204 (E.D.N.Y. 1999)(granting departure in part because defendant had late-stage AIDS) *with United States v. Depew*, 751 F. Supp. 1195 (E.D. Va. 1990) (refusing to depart on basis of defendant's AIDS). Judge Weinstein's opinion in *Hammond* surveys a number of cases from the federal courts that grant and deny departures on the basis of a physical impairment.

[6] We have provided under seal to the court two photographs of Mr. Dvorak that show the effects of the disease. These photographs depict Mr. Dvorak standing normally and illustrate the extent of the curvature of his spine and the resulting distortion of his body. Although these photographs may be graphic, they illustrate the effect of Mr. Dvorak's disease.

child. As a result, the condition has and will continue to grow progressively worse.

One important consequence of Mr. Dvorak's disease, in the opinion of Dr. Elson, is organ displacement. The abnormal curvature of Mr. Dvorak's spine compresses his lungs and diminishes their capacity to breathe and handle oxygen. This is a degenerative condition. It gives him, in Dr. Elson's words, "severe shortness of breath, difficult and labored breathing," and unusual susceptibility to respiratory diseases. *See* Affidavit of Dr. Elson at 16 (Attached as Exh. "A")("Elson Aff."). Although Dr. Elson will not be able to testify at sentencing on April 28, he will be available by telephone to respond to any questions the Court has.

The condition has the most profound effects on Mr. Dvorak's current life. Mr. Dvorak lacks the ability to walk up stairs or to walk any distance greater than about 50 feet. The exertion from undertaking physical activity even this mild leaves him short of light-headed and exhausted. He cannot carry anything that weighs more than a few pounds. When Dr. Blake examined him in her office, she found that he was "easily winded" even in the examination room.

Dr. Elson reached similar conclusions. He found that Mr. Dvorak suffers from severe lung disease and other diseases in addition to the kyphoscoliosis. Mr. Dvorak lacks the ability to "perform ordinary daily activities, such as walking, climbing stairs, carrying packages, dressing, and bending to pick objects off the floor." *Id.*

Dr. Elson prescribed chronic ambulatory oxygen for Mr. Dvorak in February. Since then, Mr. Dvorak has used a portable oxygen canister outside the home and an oxygen concentrator at home. (The concentrator remains stationary and Mr. Dvorak breathes through a 50-foot hose attached to it). Dr. Elson observed that Mr. Dvorak "must have his oxygen available at all times, even during minor exertions." Elson Aff. at 9. Dr. Elson found that his initial prescription of oxygen at the level of 2 liters per minute was inadequate and

increased his use to 3 liters per minute for minor exertion and 4 liters per minute for any greater exertion.[7]

Mr. Dvorak thus faces an intractable dilemma: he cannot survive without ambulatory oxygen, and only two Bureau of Prison facilities in the entire country may be able to provide Mr. Dvorak with the oxygen and other medical attention he needs. Even those facilities can accommodate Mr. Dvorak only in prison hospitals.[8] He cannot perform ordinary life activities without having chronic ambulatory oxygen -- that is, a tank of oxygen with him at all times. Even with such oxygen, Mr. Dvorak's functioning in Dr. Elson's view, "does not return him to normal." Elson Aff. at ¶ 9. Without such oxygen, as Dr. Elson observes, Mr. Dvorak "will not be able to sustain himself and prevent heart failure." *Id.* at ¶ 12. Dr. Elson further observes that both Mr. Dvorak's "condition and his lack of treatment are life threatening." *Id.*

Furthermore, even if Mr. Dvorak is sentenced to incarceration within one of the two Medical Referral Centers, he faces the almost insurmountable hurdle of getting to his destination. The Bureau of Prisons and the Marshals Service cannot fully guarantee that Mr. Dvorak will be provided with oxygen and other medical necessities if he is transported in their custody. In fact, if Mr. Dvorak is sentenced immediately to incarceration, he may spend interminable days being shuttled from one county jail to another until he reaches his destination and the Bureau of Prisons doubts any of these facilities would be able to provide him the medical attention he needs, let alone the fact that such travel would require physical exertion that Mr. Dvorak is unable to sustain.

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[7] Dr. Elson cannot legally prescribe oxygen above 4 liters per minute.

[8] According to a conversation with the Bureau of Prisons Medical Intake Unit, only the Medical Referral Centers in Lexington, Kentucky and Rochester, Minnesota are available to Mr. Dvorak in the event of his incarceration. Even the Bureau of Prisons' new facility in Devons, Massachusetts is ill-equipped at this time to handle a patient in Mr. Dvorak's condition.

The oxygen canisters themselves are too dangerous to permit inside a non-medical prison. Attached to this memorandum is a copy of the warning instructions that come with the oxygen equipment that Mr. Dvorak uses. *See Ex. B.* The instructions warn that the oxygen is explosive and flammable. It is doubtful that the correctional authorities, particularly any of the county jails that may have to house Mr. Dvorak, would permit him to bring such equipment into a prison.

Even with the support of ambulatory oxygen, his illness would prove extraordinarily debilitating in prison. It would mean that he could perform no useful job in prison. He would be unable to perform the most menial task for himself, such as laundry or cleaning. He could not walk any substantial distances or climb stairs. He could barely walk between buildings for meals or activities. He cannot simultaneously carry an oxygen canister and other personal items across a facility. The Court would be sentencing Mr. Dvorak to a prison hospital bed.

Mr. Dvorak, furthermore, would be subject to continuing deterioration of his medical condition if he were sent to prison. The Guidelines permit a court to depart downward to avoid interference with a defendant's medical treatment. Thus, in *Greenwood, supra*, the Fourth Circuit upheld a departure in part because "incarceration would jeopardize [the] treatment" that the defendant was receiving. *Greenwood*, 928 F.2d at 646. In *Rioux, supra*, the Court upheld a departure in part to avoid interference with the monitoring of the defendant's continued recovery.

Mr. Dvorak also would be vulnerable in the extreme to any kind of respiratory diseases. Dr. Elson notes that Mr. Dvorak's infirmities would require "immediate pulmonary care, especially upon the first signs of infection." Elson Aff. at ¶ 10. He would be unusually vulnerable to respiratory infections because he has reduced lung capacity and lung disease and would be exposed in prison to a population with a higher incidence of respiratory disease and less access to

treatment than the population as a whole. Sentencing Mr. Dvorak to a prison hospital would mean sentencing him to increased exposure to life-threatening diseases.

C. Mr. Dvorak Would be Vulnerable to Attack in Prison

A federal court may depart from a Guideline sentence on the grounds that the defendant would be vulnerable to abuse in prison. *Koon*, 518 U.S. at 112; *United States v. Maddox*, 48 F.3d 791, 797-98 (4th Cir. 1995). The Fourth Circuit in *Maddox* held that the Sentencing Commission "did not adequately address extreme vulnerability as a ground for departure," *id. (citing United States v. Lara*, 905 F.2d 599, 602-03 (2d Cir. 1990)). The court does not make a finding of vulnerability based simply on the crime with which the defendant is charged, but instead must make an individualized determination. *See Koon*, 518 U.S. at 112 (confirming that district court could depart for vulnerability given " 'extraordinary notoriety and national media coverage of this case, coupled with the defendants' status as police officers'."

Mr. Dvorak's size and physical ailments would make him extraordinarily vulnerable to abuse in prison, even within the confines of a medical facility. He is 5'3" and 135 pounds. He lacks the lung capacity to ascend a flight of stairs and the muscle capacity to carry anything that weighs more than a few pounds. It would be inconceivable that he could defend himself if attacked in prison. He lacks the physical strength to defend himself or even to summon help. Compare, *Maddox, supra*, (denying departure for vulnerability where defendant was 5'10" and 155 pounds and suffered no other unusual physical or mental impairment).

These two factors together warrant a downward departure for Mr. Dvorak. *See, e.g., Hammond, supra*, 37 F. Supp. 2d at 207 (combination of factors may warrant departure); *see generally, Koon*, (district court may properly depart based on combination of permissible factors).

IV. The Appropriate Sentence

We recommend a sentence that would allow Mr. Dvorak to continue to have access to the ambulatory oxygen apparatus that he needs. As a practical matter, only two correctional facilities in the entire country may be able to provide Mr. Dvorak with his most basic medical needs. None can provide him the specialized medical treatment he requires. Dr. Elson has suggested that Mr. Dvorak may require treatment at home, and is willing to treat him at home. Furthermore, the Bureau of Prisons has very limited means of transporting Mr. Dvorak to his destination if he is ordered incarcerated because of his special needs. We suggest that the court depart downward to a degree necessary to reach a sentence in Zone A or Zone B of the Sentencing Table.[9]

The Court then could sentence Mr. Dvorak to a period of home detention, or home detention as a condition of probation for an appropriate period of time. This would permit Mr. Dvorak to continue to have the oxygen that he needs to live. Mr. Dvorak, who has helped to build Ritz for twelve years, would prefer to be able to continue to hold his job at Ritz, even if he must work from home. A sentence of home detention would permit him, if the Court allowed it, to continue to work at Ritz, or at some other place if the Court forbade him from working at Ritz.

The Court also could impose further restrictions on the work he does at Ritz. Ritz removed Mr. Dvorak from any contact with government agency customers approximately a year ago, as a precautionary measure. If the Court thought it appropriate, the Court could order such a restriction as a condition of Mr. Dvorak's probation or supervised release.

Although Mr. Dvorak is extremely limited in the kinds of community service he could perform, he would welcome the

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[9] The offense level could not exceed Level 10.

opportunity to perform such service as could be arranged through the Probation Office.

V. Restitution

The PSR discusses the issue of restitution to be made by Mr. Dvorak. The PSR amply documents Mr. Dvorak's relative lack of resources to make any restitution. The testimony at trial showed that Ritz, not Mr. Dvorak, received the payments from DEA. The government already has conveyed to Ritz its intention to seek recovery of these amounts from the company.

The government also has recovered a considerable portion of the proceeds of Burchell's conspiracy from Burchell himself His plea agreement required him to return hundreds of items of stolen property to the government, and to turn over cash, automobiles and his houses. The government already has recovered from Burchell the entire value of the items provided by Ritz.

Under 18 U.S.C. § 3663A the Court must consider the value of recovered property in fashioning a restitution order. Under 18 U.S.C. § 3663A(b), the court must order the return of property to its rightful owner, or the return of the value of the property if the return of the property itself is "impossible, impracticable, or inadequate." Mr. Dvorak does not have the stolen property to be able to return it. The government recovered some of the stolen property itself from Burchell. Ritz received the payments for the items, not Mr. Dvorak. He therefore cannot return to the government any of the stolen items. Under those circumstances, the Court's restitution order should deduct the value of the property recovered from Burchell, including the value of the cash, cars, and houses. Furthermore, Ritz never received payment for the last two invoices (Gov't Exhibits 77 and 78), covering some $48,000. As the government never lost this money, and it received the goods ordered, Mr. Dvorak should not have to repay it.

VI. Bail Pending Appeal

The government's sentencing memorandum correctly notes that it expects the defendant to appeal his conviction. At the time the defendant has submitted this Memorandum on Factors Relating to Sentencing, the court has not ruled on Defendant's pending motions for acquittal and a new trial. If the court denies those motions, the defendant intends to appeal.

If the Court sentences Mr. Dvorak to incarceration, we request that the Court release Mr. Dvorak pending an appeal for two reasons. First, the defendant meets the criteria for release pending appeal in 18 U.S.C. § 3143(b). He does not pose a danger to the community and he poses no danger of flight. Furthermore, Mr. Dvorak's appeal would raise substantial questions of law, as described in more detail in our pending motions for acquittal and a new trial. Second, there is a pressing practical reason for release pending appeal. If the Court orders incarceration for Mr. Dvorak despite the danger to him from incarceration given his medical condition, it would take some time for the Bureau of Prisons to be able to arrange a facility suitable to Mr. Dvorak's unusual and unique physical and medical circumstances. Incarceration of Mr. Dvorak without ambulatory oxygen would cause a substantial and perhaps fatal risk to his life; and temporary incarceration (pending the outcome of appeal) of Mr. Dvorak with his oxygen will prove unacceptable to the Bureau of Prisons because there are no facilities nearby to hold Mr. Dvorak, and arranging transportation to one of the two facilities that can house him will take a great deal of preparation. Release of Mr. Dvorak pending appeal would allow the Bureau of Prisons to designate him to one of the two suitable facilities available once proper medical arrangements can be made. Accordingly, we request that the Court release Mr. Dvorak pending appeal.

Respectfully submitted,

/s/_____

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Dated: April 21, 2000

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the POSITION OF DEFENDANT ROBERT F. DVORAK WITH RESPECT TO SENTENCING FACTORS was served by overnight mail (federal express) this 21st day of April, 2000 to the following:

Stephen P. Learned
Assistant United States Attorney
United States Attorneys Office
2100 Jamieson Avenue
Alexandria, Virginia 22314
703/299-3981 (Facsimile)

/s/_____
Alan D. Strasser, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE

EASTERN DISTRICT OF VIRGINIA

Alexandria Division

CRIMINAL NO.: 99-412-A
(Sentencing Date: 4/28/00)

UNITED STATES OF AMERICA

v.

ROBERT F. DVORAK

AFFIDAVIT OF SUPPORT
for Robert F. Dvorak's Medical Condition

AFFIDAVIT OF NORTON A. ELSON, MD

NORTON A. ELSON, M.D., being duly sworn, deposes and says:

1. That I am an adult over the age of 18.

2. That I practice medicine at 6525 Belcrest Road, Suite 208, Hyattsville, MD, United States of America. I received my medical degree from New York University School of Medicine in June 1969 and my pulmonary

specialization in 1974 from the University of California School of Medicine.

3. I was born in the United States of America and am a citizen of same.

4. This affidavit is in support of my care of Mr. Robert F. Dvorak and his current, chronic and serious medical condition.

5. Mr. Dvorak is a 5 foot 3 inch tall, 45 year old gentleman, unmarried, no frank allergies (except intolerance to epinephrine), and not on any current medication.

6. Mr. Dvorak suffers from extremely severe kyphoscoliosis (The combination of Kyphosis and Scoliosis. Kyphosis is a posterior curvature of the thoracic spine--pertaining to or affecting the chest. Scoliosis is a congenital lateral curvature of the spine. He is convexed to the left.). His kyphoscoliosis is chronic, progressive and a deteriorating disease with organ displacement. As a result he suffers from severe restrictive lung disease (severe decrease in breathing capacity) with diminished breath sounds at the bases, severe shortness of breath, exertional desaturation, dyspnea (difficult and labored breathing), nocturia (excessive urination at night), chronic perennial rhinitis (inflammation of mucous membrane of the nose) with post nasal drip, tachycardia (excessive heart rate), and episodic chronic bronchitis (inflammation of the larger air passages of lungs, i.e., the bronchi).

7. Mr. Dvorak, as a result of the above conditions, has experienced profoundly increased exertional dyspnea which restricts his physical capacity to perform ordinary daily activities, such as walking, climbing stairs, carrying packages, dressing, and bending to pick objects off the floor. This is confirmed by his pulse oximetry test results which show 90 percent saturation at rest but rapid and profound desaturation of blood oxygen level with minor exertion, e.g., walking in office, to 77 percent and suffers prolonged hypoxemia (below normal oxygen content in arterial blood due to deficient oxygenation of the blood) with recovery only at low 80's (80-

82 percent) where it hovers dangerously low. Any physical threats to him could prompt a life-threatening situation.

8. Mr. Dvorak's severe restrictive lung disease results in FEV 1 test results at the profoundly low level of 18 percent and forced vital capacity of 17 percent, whereas a normal level is above 80 percent. Mr. Dvorak is functioning at only 25 percent of normal capacity.

9. Given Mr. Dvorak's severe conditions as stated above, I immediately prescribed chronic ambulatory oxygen (metal oxygen tanks and cannula hose which he must carry at all times) and a home based non-portable oxygen concentrator (50 foot delivery hose). He must have his oxygen available at all times even during minor exertions. Initially, I prescribed Mr. Dvorak use 2 liters of oxygen per minute, however, this was insufficient and therefore I increased his use to 3 liters per minute during minor exertion and to the increased level of 4 liters per minute during higher levels of exertion, e.g., walking or climbing stairs. Use of the oxygen while helping his deteriorated state does not return him to a normal functioning level. He continues to have impairment of his ability to do any normal daily activities and will continue to experience profound deteriorated capacity and ability. Without the use of oxygen Mr. Dvorak will suffer from profoundly impaired functional capacity and increased mortality risk from heart failure.

10. Given Mr. Dvorak's chronic bronchitis, severe lung disease and diminished oxygen level condition, he requires continual and immediate pulmonary care, especially upon first signs of infection which could rapidly progress to pneumonia (which in this case would be life threatening).

11. His family medical history includes ischemic heart disease (low oxygen state due to obstruction of arterial blood supply or inadequate blood flow to tissue), heart failure, and breast cancer.

12. Oxygen is regulated by the FDA and is only available if prescribed by a doctor. Oxygen is stored at

explosive pressures and is a dangerous highly combustible substance. The administration of oxygen in an institutional setting would be inappropriate, yet without it, Mr. Dvorak will not be able to sustain himself and prevent heart failure. If Mr. Dvorak does not have continual access to oxygen 24 hours a day both his condition and the lack of treatment are life threatening.

I declare under penalty of perjury that the foregoing is true and accurate.

/s/_____

Date: April 19, 2000 **NORTON A. ELSON, MD**

Subscribed by and sworn to before me this 19th day of April 2000.

My Commission expires on the 10th day of March, 2004.

/s/_____

Notary Public

Anne Marie Bohannon

Oxygen Equipment
Allied Safety Information

Did you know...

- Oxygen in pure form- the kind we as medical professionals use every day- can be a dangerous substance.
- Pure 02 will make a fire hot enough to burn metal.
- 02 is stored at explosive pressures.
- Cryogenic oxygen is so cold it can cause instant frostbite, or worse.
- 02 is regulated by the FDA as a drug and requires a prescription- "USP Oxygen. Dispense only on order of a Physician."
- Oxygen also gives us the power to heal. Who would deny an EMS provider its life giving power in resuscitation, or the emphysema patient the freedom allows them by their oxygen "walker"?
- The difference between oxygen as a life saver and oxygen as a hazard to life comes from the equipment we choose to control and dispense it, and the care we take with that equipment.
- This pamphlet is not about the specifics of using or maintaining your equipment, but rather about the basic principles that apply to the safe use of all equipment used with Oxygen.

Problems and Consequences

Oxygen does not burn, but oxygen supports combustion. A fire which will burn in air will burn explosively in pure oxygen. A material which will not burn in air may burn very well in pure oxygen- for example the metal in the oxygen cylinder or the regulator.

Oxygen is stored at high pressures. A typical cylinder of gaseous oxygen will be pressurized to 2,200 psig.

Released suddenly, as when a valve is broken off, there is enough power to drive a heavy cylinder through a concrete wall.

Sudden release of this very high pressure into an enclosed space (as when a cylinder valve is opened too rapidly) allows rapid compression The result is heat which can raise the temperature inside if a regulator to thousands of degrees instantaneously, and make tile outside so hot you can't touch it.

Principles

The Triangle of Fire

The Triangle reminds us that for a fire to occur, you must have Fuel, Oxygen, and Heat. Oxygen related fires are unique because the high concentration of oxygen allows virtually anything (metal fragments, dust, dirt) to act as fuel.

Heat of Compression

The Heat of Compression provides the necessary heat for fire to start- a cylinder valve opened too rapidly raises temperatures into the thousands of degrees.

Friction

Another source of heat, friction can be caused by the sudden motion of particles inside your equipment- as when a cylinder valve is first thrown open.

Hydrocarbons

Hydrocarbons are oils and greases. (gasoline is a hydrocarbon, and so is the oil from your skin.) They are the ideal fire starters, because they ignite almost spontaneously in oxygen.

DOs *and* DON'Ts *with Oxygen Handling Equipment*

- ***Do*** treat all your oxygen handling equipment with care. Store it in clean, dry locations.
- ***Don't*** use equipment which is visibly dirty, in poor repair, or damaged.
- ***Do*** maintain all your oxygen handling equipment exactly as per the manufacturers instructions.
- ***Don't*** allow your oxygen handling equipment to get near any oil or grease. If it gets oil on it, condemn it until it can be properly cleaned.
- ***Do*** use plugs, caps and plastic bags to protect "off duty" equipment from dust and dirt.
- ***Don't*** allow smoking around oxygen.
- ***Do*** designate a special "clean area" for work with oxygen handling equipment.
- ***Don't*** work on oxygen handling equipment with ordinary tools.
- ***Do*** designate special tools, clean them and store them for Use With Oxygen Equipment Only.
- ***Don't*** use parts which may have contacted oil or grease

Did you know...

- Always wear gloves when working on oxygen hardware: It keeps the oil from your hands off the parts.
- If you need to clean parts: Use Tri Sodium Phosphate in warm tap water, scrub the parts carefully inside and out.
- When clean, rinse the parts, discard the water and rinse again. Use deionized or distilled water for this.
- Let the parts air dry. Don't try to wipe them off unless you have lint free towels (some lab wipes can work) Cover the parts when drying. They will take longer to dry, but you'll avoid getting dust on them.
- Reassemble wearing gloves and using cleaned tools. If you store parts or complete product, store it in a sealed plastic bags.
- The following standards are useful when handling parts for oxygen:

CGA 4.1 1985 "Cleaning Equipment for Oxygen Service"

CGA E-7 1992 "Standard for Medical Gas Regulators and Flow meters"

CGA E-4 1994 "Standard for Gas Pressure Regulators"

All three are available from the Compressed Gas Association at (703) 412 0900.

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EXHIBIT "C"

FILED UNDER SEAL

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

CRIMINAL NO. 99-412-A
(Sentencing Date: 4-28-00)

UNITED STATES OF AMERICA
v.
ROBERT F. DVORAK

Defendant

SUPPLEMENTAL SENTENCING MEMORANDUM OF THE UNITED STATES

In his sentencing memorandum and response to the Presentence Report, Dvorak raises a number of issues that need to be addressed briefly by the United States.

1. THE DEFENDANT'S EXTRAORDINARY IMPAIRMENT

The Government does not challenge the conclusions of Dr. Elson that Dvorak needs ambulatory oxygen throughout the day. The undersigned attorney has talked by phone with Dr. Elson. Dr. Elson stated that, with the full use of the oxygen canister, Dvorak would still be significantly limited in his physical activity by shortness of breath. But Dr. Elson also stated that Dvorak would be able to engage in the same level of activity (albeit limited) that he engaged in "six months ago" at his job at Ritz Audio Visual. Dr. Elson rejected the statement that the "Court would be sentencing Mr. Dvorak to a prison hospital bed." (Defendant's Sentencing Memorandum, at 18). Therefore, whatever Dvorak did at his job six months ago, he will be able to do in a prison medical facility with the use of ambulatory oxygen.

Moreover, the Government rejects the idea that Dvorak can not be safely transported to a prison medical facility. The

United States Marshals Service has experience using medical air ambulances in transporting prisoners.

Without identifying the Bureau of Prisons official, Dvorak states that "according to a conversation with the Bureau of Prisons Medical Intake Unit" he would be confined to one of only two prison hospitals. The undersigned attorney talked recently with David Hicks, the chief medical designator for the Bureau of Prisons. Hicks stated that three facilities are currently available and that in two months, a fourth facility, at Devons, Massachusetts, will be available. According to Hicks, a fifth facility at Butner, North Carolina, will be available by December of this year.

2. THE CALCULATION OF LOSS

Dvorak argues that the Government's calculation of loss should be reduced by the amount attributable to those "standard" items sold to DEA, such as video projectors, cameras, TV's, etc. Dvorak argues that he did not know, nor could he have known, that Burchell was embezzling these "standard" (audio visual) items. In short, Dvorak argues that it was not foreseeable to him that Burchell was embezzling the kind of items that Ritz routinely sells to the Government or to any other customer.

This argument ignores the documentary evidence. At Burchell's request, Dvorak was selling many "standard" items to DEA, but Dvorak was not invoicing these items with "standard" descriptions. **It might have been standard for Ritz to sell a car stereo or a disc player to a customer, but it was not standard for Ritz to invoice these items as an "electronic box" or an "optical sensor."** (See Government Exhibit #160, page 3, transactions 41 and 45). Contrasting the Ritz description of the item contained in the Ritz internal documents with the description of the item on the invoice sent to DEA, Government Exhibit #160 listed all items that appeared to be falsely or deceptively or incompletely described when they were invoiced to DEA.

It was obvious to Dvorak that the purchases of misdescribed items were being concealed from Burchell's DEA colleagues. From there it was foreseeable that Burchell was converting them to his own use or the use of others. The Government's loss calculation is based upon the amount DEA paid for all of these misdescribed items (beginning with transaction #18 in February 1994).

3. THE AMOUNT OF RESTITUTION

Dvorak argues that his restitution obligation should be reduced by the dollar value of the items obtained by seizure, forfeiture or restitution from Robert Burchell. Without citing any factual support, the defendant states categorically that "[t]he government already has recovered from Burchell the entire value of the items provided by Ritz." (Defendant's Sentencing Memorandum, at 21). This argument is both factually and legally misplaced.

According to records available to this Office, property in the amount of $476,876.48 was administratively forfeited from Robert Burchell. This included everything seized from Burchell, from audio visual equipment, movies and music discs, to cars and bank accounts. Michael Hendrix, and to a lesser degree, Jean Burchell, participated in the Ritz/DEA embezzlement scheme. Electronic equipment valued at $33,200 was administratively forfeited from Michael Hendrix. A Jeep Grand Cherokee, valued at $31,700 was administratively forfeited from Jean Burchell.

Despite this substantial forfeiture, the court ordered Robert Burchell to pay $2.68 million in restitution, the total amount that DEA had paid for items that Burchell had embezzled over a nine year period. Burchell has thus far paid $79,571 to satisfy this obligation. Therefore, neither the Government nor DEA has been made whole.

Moreover, defendant's argument assumes that forfeiture and restitution are mutually exclusive remedies. Even Burchell himself was unable to offset the value of forfeited items from his restitution obligation. See United States v.

Emerson, 128 F.3d 557, 566 (7th Cir. 1997) (both forfeiture and restitution may be ordered even if the government receives the windfall of double payment).

Dvorak has argued that he was never paid for transactions numbers 77 and 78. The Government is prepared to accept this claim and therefore recommends that the dollar figure furnished in its initial sentencing memorandum (namely, **$1,087,985.32**) be reduced for restitution purposes by **$48,056.22**. This leaves a restitution figure of **$1,039,929.10**

4. THE EX POST FACTO RESULT OF MANDATORY RESTITUTION

Dvorak argues that mandatory restitution under 18 U.S.C. §3663A (c) would apply an ex post facto punishment upon the defendant since the offenses charged in the indictment straddled the April 1996 enactment of the mandatory provisions of restitution. To the contrary, since conspiracy is a continuing offense, the full loss can be ordered under the mandatory provisions of restitution, even though some of that loss resulted from activity prior to April 1996. United States v. Kubick, 205 F.3d 1117, 1999 WL 1567724 (9th Cir. 1999); United States v. Duncan, 162 F.3d 1156, 1998 WL 558756 (4th Cir. 1998).

5. CONCLUSION

For the foregoing reasons and authorities, the United States submits that the defendant's sentencing guideline range of 37 to 46 months is fully supported by the record.

Respectfully submitted,

HELEN F. FAHEY
UNITED STATES ATTORNEY

/s/_____
Stephen P. Learned
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of April, 2000, I have sent either by first class mail, United States Postal Service, or by overnight commercial carrier, a copy of the foregoing, namely, the Government's Supplemental Sentencing Memorandum to defendant's counsel set forth below:

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/s/_____
Stephen P. Learned